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A TREATISE

ON

THE LAW

OF

EXECUTORS AND ADMINISTRATORS

BY

THE RIGHT HONOURABLE

SIR EDWARD VAUGHAN WILLIAMS

(LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS).

TENTH EDITION

BY

THE RIGHT HONOURABLE

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A LORD JUSTICE OF APPEAL

AND

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OF THE ADEMPTION OF LEGACIES.

Ademption by inconsistent legacy.

If a gift to one legatee in the earlier part of a Will be inconsistent with a subsequent gift to another legatee in the Will, or in a codicil, this inconsistency operates as an ademption or revocation of the earlier gift (*a*).

SECTION I.

Of the Ademption of Specific Legacies.

The general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie* as described in the Will: otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed (*b*).

(*a*) See *Kermode* v. *McDonald*, L. R. 1 Eq. 459, 460; L. R. 3 Ch. 584.

(*b*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 110. So where the testator took the goods bequeathed with him on a voyage, and the ship was lost at sea and the goods perished, and he was drowned; it was held, that as it could not be shown that the testator died before the goods perished, the legatee had no interest in them, and no claim on the money for which they had been insured: *Durrant* v. *Friend*, 5 De G. & Sm. 343. See *ante*, p. 955.

Demonstrative legacies:

It must be here observed that the rule of ademption does not apply to *demonstrative* legacies: *i.e.*, to legacies of so much money with reference to a particular fund for payment: as for instance, legacies given *out* of a particular stock (*c*), or debt (*d*), or term (*e*): for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate (*f*).

It is now proposed further to consider the rule above laid down, and certain qualifications of it, by applying it to some of the examples of specific legacies heretofore adduced (*g*).

Ademption of specific legacy of a debt:

As to the ademption of specific legacies of debts and securities for money: If a debt specifically bequeathed be received by the testator, the legacy is adeemed: because the subject is extinguished, and nothing remains to which the words of the Will can apply (*h*). Thus, in *Rider* v. *Wager* (*i*), the testator specifically bequeathed to A. part of a debt due to him from B., and the remainder to C.: The testator called in the money: And Lord King determined that the legacy was extinguished; and further held in the same case, the testator having bequeathed to D. a debt which D. owed him, that this legacy was adeemed by payment of the money in his lifetime (*k*). So in *Barker* v. *Rayner* (*l*), the testator effected two policies of insurance on the life of his wife, the one for 600*l.* and the other for 1,500*l.*, payable to himself, his executors, &c., within six months of his wife's death: By his Will, he gave all his right, title, and interest in the policies, the policies themselves, and all the benefit and advantage thereof, to his executors and trustees, to pay the yearly premiums during his wife's life; and after her death, he directed certain payments to be made out of the money to be received, and the remainder to be placed out upon securities at interest, and disposed of the principal and interest by the Will: He survived his wife, and himself received the amount of the policies, and after applying part of the money to particular purposes, placed the remainder out at interest upon securities, which were left in the hands of the executors: Sir John Leach held that the specific testamentary disposition of

(*c*) *Ante*, p. 918.
(*d*) *Ante*, p. 921.
(*e*) *Ante*, p. 923.
(*f*) *Ante*, p. 913.
(*g*) *Ante*, p. 914 *et seq.*
(*h*) *Badrick* v. *Stevens*, 3 Bro. C. C. 431.
(*i*) 2 P. Wms. 329, 330.
(*k*) 2 P. Wms. 331.
(*l*) 5 Madd. 208.

the policies was adeemed: And this decision was confirmed on appeal by Lord Eldon (*m*). Again, in *Gardner* v. *Hatton* (*n*), a testator bequeathed the interest of 7,000*l.* secured on mortgage of an estate at Worstead, in the county of Norfolk, belonging to Mr. Robert Tuck: The 7,000*l.* and interest were received after the date of the Will by the testator's agent, on his account, and immediately afterwards, 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other moneys, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount: And Sir L. Shadwell, V.-C., held that the legacy was specific, and notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed.

So a partial receipt by the testator of the debt specifically bequeathed will operate as an ademption *pro tanto.* Thus, in *Ashburner* v. *M'Guire* (*o*), where a bond debt was bequeathed, the obligor became bankrupt, and the testator received a dividend under the commission in respect of the debt: Lord Thurlow held, that this receipt was an ademption *pro tanto.* So in *Fryer* v. *Morris* (*p*), where the specific legacy was of money due on a note for 400*l.*, and the testatrix received 385*l.* 18*s.* of the debt, Sir William Grant determined that the receipt of that sum was an ademption, on the ground of all the preceding decisions, viz., that the thing given and described no longer existed.

Such being the principle by which the ademption of specific legacies is governed, the fallacy is obvious of a distinction formerly taken with respect to a specific legacy of a debt, viz., between a compulsory and a voluntary payment of it to the testator; but it was finally established, according to the words of Lord Thurlow, in *Humphries* v. *Humphries* (*q*), that "the only rule to be adhered to is to see whether the subject of the specific bequest remained in *specie* at the time of the testator's death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject

(*m*) 2 Russ. Chanc. Cas. 122. See for further examples, *Birch* v. *Baker*, Mosely, 375; *Stanley* v. *Potter*, 2 Cox, 180.

(*n*) 6 Sim. 93; cf. *Re Bridle*, 4 C. P. D. 336.

(*o*) 2 Bro. C. C. 108.

(*p*) 9 Ves. 360.

(*q*) 2 Cox, 185.

of the bequest, would be productive of endless uncertainty and confusion" (*r*).

A distinction was made by Sir John Stuart, V.-C., in the case of *Clark* v. *Browne* (*s*) between the gift of a debt *quâ* debt and the gift of the sum of money produced when the debt shall have been recovered and ceased to exist as a debt; as for example, where there is a gift of "whatever sum may be received from my claim on A. B.": In such a case it may be inferred that the testator contemplated the recovery of the debt in his own lifetime, and that the subject of the gift is not the debt itself, but the amount recovered in respect of it; and the receipt of such amount by the testator will be no ademption: at all events if he sets it apart, and does not mix it with the general mass of his property. But from this decision, as well as from that of Sir W. Grant in the earlier case of *Le Grice* v. *Finch* (*t*), Sir G. Jessel, M. R., dissented (*u*), holding these cases always to be cases of construction; that is, to turn on the question whether the gift was of the money as invested, or of the proceeds of the fund however invested (*x*).

Ademption of gifts under powers of appointment:

The doctrine of ademption applies to an appointment by Will, whether made under a general or under a special power, and such an appointment fails in case of the non-existence at the death of the testator of either the object or the subject of the appointment (*y*).

Ademption of a specific legacy of stock.

When stock is specifically bequeathed, and it does not wholly, or does only in part exist at the testator's death, the legacy will

(*r*) *Jones* v. *Southall*, 32 Beav. 31. For an instance of a receipt which does not amount to an ademption, see *Graves* v. *Hughes*, 4 Madd. 381.

(*s*) 2 Sm. & G. 524.

(*t*) 3 Mer. 50.

(*u*) *Harrison* v. *Jackson*, 7 C. D. 339. See also *Manton* v. *Tabois*, 30 C. D. 92, *per* Bacon, V.-C.

(*x*) In *Moore* v. *Moore*, 29 Beav. 496, and *Morgan* v. *Thomas*, 6 C. D. 176, it was held, on the construction of the Wills in question, that the gift was of the proceeds of the fund and that the money could be traced. But see and cf. *Re Bridle*, 4 C. P. D. 336, where a testator bequeathed to his niece, L. B., a mortgage of 200*l.*, which was subsequently redeemed during the testator's lifetime, and it was held that the bequest was adeemed, although the testator had placed the mortgage money to a separate account at his banker's, and put the pass book into the hands of the legatee.

(*y*) *Re Dowsett*, [1901] 1 Ch. 398; *Re Moses*, [1902] 1 Ch. 100; [1903] A. C. 13. In *Re Johnstone's Settlement*, 14 C. D. 162, where the Will was made in exercise of a power of appointment, the legacies were held not to be adeemed by a subsequent change of investment.

either be totally or partially adeemed, as the case may be. Thus, in *Ashburner* v. *M'Guire* (*z*), the testator made the following bequest: "To A., now at school, &c., my capital stock of 1,000*l.* in the India Company's stock, with the dividends, &c.:" The fund was afterwards sold by the testator: And Lord Thurlow decided that the legacy was adeemed (*a*).

And it is said, that the legacy is irretrievably adeemed by the sale of the stock; and will not be revived by a new purchase of similar stock by the testator (*b*). In *Pattison* v. *Pattison* (*c*), a testator gave to Margaret Forbes, whom he afterwards married, among other bequests the sum of 50*l.* Long Annuities, which he described as purchased with 1,000*l.* left him by the Will of James Tillard: After his marriage he made a codicil, by which he confirmed to his wife the benefits given to her by his Will, in addition to the provision made for her by her marriage settlement: He afterwards sold his Long Annuities, and with the produce purchased new Annuities, which differed only from the Long Annuities by being terminable a quarter of a year sooner: Subsequently to this transaction, he made another codicil, by which he confirmed his Will and former codicil: And Sir John Leach, M. R., held, that the legacy of 50*l.* Long Annuities was adeemed: his Honour observing that the law was settled, that a

(*z*) 2 Bro. C. C. 108.

(*a*) See also *Harrison* v. *Jackson*, 7 C. D. 339. And where a testator having certain debentures at the date of his Will thereby gave "all my debentures" upon certain trusts, and after the date of the Will the testator exercised an option given to him by the company who had issued the debentures and converted them into debenture stock of the same company; it was held that the debenture stock did not pass: *Re Lane*, 14 C. D. 856. But see and cf. *Re Nottage*, [1895] 2 Ch. 657; *Re Weeding*, [1896] 2 Ch. 364. A gift of "all my interest in the Coventry Street Estate" was held to be adeemed by the sale of the estate subsequently to the Will, although the purchase money stood on deposit at the testator's bankers at the time of his death: *Manton* v. *Tabois*, 30 C. D. 92. It sometimes happens that a gift held not to be specific, but general, fails through the non-existence of a standard of value; for instance, a gift of so much money as will buy fifty shares in a company which at the death of the testator had been reconstructed and had ceased to exist: *Re Gray*, 36 C. D. 205.

(*b*) But see the *dicta* of Lord Talbot in *Partridge* v. *Partridge*, Cas. temp. Talb. 227; of Lord Hardwicke in *Evelyn* v. *Ward*, 1 Ves. Sen. 426; and of Sir Thomas Clarke, in *Drinkwater* v. *Falconer*, 2 Ves. Sen. 625.

(*c*) 1 M. & K. 12.

legacy is adeemed if the specific thing do not exist at the testator's death.

Cases where specific legacy of stock is not adeemed.

But no ademption will take place when the stock specifically bequeathed is exchanged by act of law; as when a fund is converted into one of a different description by Act of Parliament (*d*); nor where the stock has been transferred into another fund by a trustee without the knowledge or authority of the testator (*e*); nor where the stock is merely transferred with the testator's consent, from the name of his trustee into his own (*f*); or, as it would seem, from the names of old to those of new trustees, or from the specified fund to a fresh security, under a power so to do (*g*): Nor, perhaps, will the legacy be adeemed, when the testator lends the stock specifically bequeathed, on condition of its being replaced (*h*).

In *Basan* v. *Brandon* (*i*), a testator, resident in Jamaica, bequeathed to A. B. 2,000*l.*, part of a sum of 7,000*l.* in the hands of his agents in England and received by them from the Transport Board on his account: The testator afterwards went to Philadelphia, where he died: Seven days before his death, he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his moneys in their hands received from the Transport Board, in any stock most beneficial to his estate: The agent wrote accordingly; but, some time before his letter arrived in England, the agents there, had, of their own accord, invested the whole of the testator's moneys in their hands in the four per cents.: And Sir L. Shadwell, V.-C., held, that the legacy was not adeemed: his Honour being of opinion that the unauthorized act of the agents could not alter the Will: and that a mere unexecuted intention to change the state of a fund, which the testator might have revoked, and

(*d*) *Partridge* v. *Partridge*, Cas. temp. Talb. 226; *Bronsdon* v. *Winter*, Ambl. 59. See also *Oakes* v. *Oakes*, 9 Hare, 666.

(*e*) *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747. So, where the subject of a specific legacy was sold during the testator's lunacy by his son, it was held by Stuart, V.-C., that there was no ademption: *Jenkins* v. *Jones*, L. R. 2 Eq. 323. But where after the Will a testator was found a lunatic, and *by an order in the lunacy* certain shares specifically bequeated were directed to be sold and the proceeds invested in other securities, the bequest of such shares was held to be adeemed: *Jones* v. *Green*, L. R. 5 Eq. 555; *Re Freer*, 22 C. D. 622.

(*f*) *Dingwell* v. *Askew*, 1 Cox, 427.

(*g*) Cf. *Re Johnstone's Settlement*, 14 C. D. 162.

(*h*) 1 Rop. Leg. 3rd edit. 292.

(*i*) 8 Sim. 171.

which, in fact, was never carried into execution, cannot, in any sense, be considered as an ademption.

Ademption of specific legacy of partnership share:

If a partner, under articles providing for the renewal of the partnership, specifically bequeaths his share of the profits (naming the amount), and upon the expiration of the old, new articles are entered into, by which his share of the profits is altered, the legacy will not be revoked by ademption (*k*).

Ademption of specific legacy of goods:

not by pawning:

As to ademption of specific legacies of goods, it must be observed, that where the disposition of the subject is not absolute, the legacy will not be adeemed: As where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death; so as to enable him to call on the executor to redeem and deliver it to him (*l*).

when by removal.

The ademption of a specific legacy of goods will sometimes be effected by the mere removal of them: Thus where the testator bequeathed all his books at his chambers in the Temple; and afterwards removed his books into the country, this was held to extinguish the legacy (*m*). So where the bequest was of all the testator's household goods, plate, linen, china, &c., &c., which should be in or about his dwelling-house at B. at the time of his death; and he afterwards took another house, into which he removed the greater part of the furniture from the house at B.; this removal was held an ademption (*n*). Again, where the testator bequeathed to his wife the lease of his house in Baker Street, and the household furniture, plate, pictures and certain other articles therein, and the lease having expired in his lifetime, part of the furniture was sold, and the remainder, together with the plate, pictures, and other articles, was removed to a house which the testator took in Edward Street; it was held, that the legacy was adeemed; because it was clear that the testator made the bequest of the furniture, &c., with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, &c., and, consequently,

(*k*) *Blackwell* v. *Child*, Ambl. 260.

(*l*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 113, by Lord Thurlow.

(*m*) *Green* v. *Symonds*, 1 Bro. C. C. 129, in note. But see *Cunningham* v. *Ross*, *post*, p. 1068; *Norris* v. *Norris*, *post*, p. 1068.

(*n*) *Heseltine* v. *Heseltine*, 3 Madd. 276. See also *Spencer* v. *Spencer*, 21 Beav. 548.

that the bequest had totally failed by the change of circumstances (*o*).

Cases where no ademption by removal.

But no ademption by removal, it would seem, will take place, where the goods are removed for their preservation, as to save them from fire (*p*); or where they are removed by fraud, or without the testator's knowledge or authority (*q*); or where, by the nature of the place described, it is clear that their locality was not referred to as essential to the bequest, as in the case of a specific legacy of goods in a ship (*r*); or where the testator has two houses, in which he lives alternately, and being possessed of one set of furniture only, which he removes with himself to each house, bequeaths, while residing in one of them, all his furniture in that house (*s*).

In *Cunningham* v. *Ross* (*t*), a testator bequeathed all his bills, bonds, &c., belonging to him, lying in the lodgings he possessed in the house belonging to Mr. Smith: At his death the testator had no effects in the house of Mr. Smith: It was contended that the legacy failed, on the authority of the case of *Shaftesbury* v. *Shaftesbury* (*u*), in which case the testator devised to his wife all his goods that should be in his house, and before his death he removed all the goods from the said house, and the devise was held void: But Sir George Lee was of opinion that the present case differed from that; for there the testator devised all his goods *that should be in his house*, which implied, that should be there at his death; but in the present case the words were only descriptive of what the testator meant to bequeath; and therefore it was immaterial whether they remained at Smith's house at the time of his death or not.

Again, in *Norris* v. *Norris* (*x*), a testator bequeathed to his wife as follows:—"All my interest in my house at Lavender Hill, the furniture, books, pictures, wines, &c., &c.: After the date of his Will, the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, and plate: He afterwards purchased more of these articles, and died at Spencer Lodge. And it was held by Knight Bruce, V.-C.,

(*o*) *Colleton* v. *Garth*, 6 Sim. 19.

(*p*) *Chapman* v. *Hart*, 1 Ves. Sen. 273; *Re Johnston*, 26 C. D. 538, 553.

(*q*) *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747.

(*r*) *Chapman* v. *Hart*, 1 Ves. Sen. 273.

(*s*) *Land* v. *Devaynes*, 4 Bro. C. C. 537; *Rawlinson* v. *Rawlinson*, 3 C. D. 302.

(*t*) 2 Cas. temp. Lee, 272.

(*u*) 2 Vern. 747.

(*x*) 2 Coll. 719.

that the testator's wife was entitled to the furniture, books, pictures, wines, and plate, which he had at the time of his death.

Ademption of legacies of terms for years:

As to the ademption of specific legacies of terms for years; generally speaking, when the testator expresses himself in the present tense, and all the words directly refer to a lease of which he was *then* possessed, a specific legacy of such lease will be adeemed by a surrender; and a new term, acquired by the testator upon a renewal of the surrendered lease, will not pass to the specific legatee (*y*): but such an ademption will, it appears, be effected only when the testator has the *legal* estate in the term specifically bequeathed: for where the testator is merely a *cestui que trust*, and the equitable interest only is bequeathed, the Court will not permit a mere surrender of the old lease by the testator and his trustee to defeat the specific legacy, but will consider the intention of the testator appearing upon the Will (*z*).

And even before section 24 of the Wills Act, 1837, no such ademption would have taken place when the expressions of the bequest had a prospective or future operation, as where they were of "all the estate which *I have or shall have to come* in the land held by me under a lease from A." (*a*); or where the old lease containing a covenant on the part of the lessor to renew, the lessee bequeathed "all my right and interest under or *by virtue* of the lease" (*b*). Lastly, a surrender of a lease will not operate as an ademption, where the bequest is not specific; as where the testator devises "all and singular my leasehold estate, goods, chattels, and personal estate whatsoever" (*c*).

1 Vict. c. 26, s. 23: bequest not to be rendered inoperative by any subsequent

By section 23 of the Wills Act, "no conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate

(*y*) *Abney* v. *Miller*, 2 Atk. 593, 597. See also *Rudstone* v. *Anderson*, 2 Ves. Sen. 418; *Hone* v. *Medcraft*, 1 Bro. C. C. 261; *Porter* v. *Smith*, 16 Sim. 251; *Cooper* v. *Mantell*, 22 Beav. 223. But see sect. 24 of the Wills Act, *post*, p. 1070.

(*z*) *Carte* v. *Carte*, 3 Atk. 174; *Slatter* v. *Noton*, 16 Ves. 201.

(*a*) *James* v. *Dean*, 11 Ves. 383, 389; *Abney* v. *Miller*, 2 Atk. 599; *Slatter* v. *Noton*, 16 Ves. 199; *Colegrave* v. *Manby*, 6 Madd. 84.

(*b*) 1 Rop. Leg. 311, 312, 3rd edit.

(*c*) *Stirling* v. *Lydiard*, 3 Atk. 199; *Digby* v. *Legard*, 2 Dick. 500. See *ante*, p. 924; but see *James* v. *Dean*, 11 Ves. 390.

conveyance or act.

Sect. 24.

Will shall be construed to speak from the death of the testator.

or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death" (*d*). And by section 24, "every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will" (*e*).

The consequence of the 23rd section above stated is, that all those cases in which it was formerly held that a Will was revoked by an alteration of the estate of the testator are put an end to, and a Will can only be revoked by marriage, by express declaration in writing, or by burning, &c. Accordingly, where a testator devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them on other trusts, it was held that the deed was not a writing declaring an intention to revoke within the 20th section; and therefore that the Will operated on such estate and interest as the testator possessed in the property at his death (*f*).

(*d*) Thus in *Saxton* v. *Saxton*, 13 C. D. 359, a testator bequeathed to his wife all his term and interest in a leasehold house in which he then resided, and after the date of the Will purchased the freehold, and it was held that the wife took the freehold. But in *Re Knight*, 34 C. D. 518, where a testator gave the lease of the house in which he should be living at the time of his decease to his wife, and at the date of the Will was living in a house held by him for a short term at a rack rent, a freehold house which he subsequently bought and went to reside in was held not to pass to his widow under the devise. Notwithstanding the Wills Act, if a testator devises real estate and afterwards sells it, and the purchase is not completed till after his death, the purchase-money belongs to his personal representatives and not to his devisee: *Farrer* v. *Winterton*, 5 Beav. 1; *ante*, p. 498; *Moor* v. *Raisbeck*, 12 Sim. 123. See *Gale* v. *Gale*, 21 Beav. 349; *Blake* v. *Blake*, 15 C. D. 481; *In the goods of Lloyd*, 9 P. D. 65.

(*e*) The cases as to the construction of this section will be found collected, *ante*, pp. 150—154, and *post*, pp. 1175—1177.

(*f*) *Ford* v. *De Pontes*, 30 Beav. 572.

SECTION II.

Of the Ademption of Legacies given as Portions.

Ademption of legacy given by father as a portion.

As to the ademption of legacies given as portions to children by their father: On this subject an artificial doctrine prevails in Courts of Equity, the establishment of which has excited the regret and censure of more than one eminent modern Judge, though it has also met with approbation from other high authorities. The rule is, that where a father gives a legacy to a child, it must be understood *as a portion*, although not so described in the Will, because it is a provision by a parent for his child (*g*): and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, not only in cases where the advancements are larger than, or equal to, the testamentary portions (*h*), but also, it has been said, in cases where the sums advanced are *less* than the sums bequeathed (*i*). But it was decided by Lord Cottenham, in *Pym* v. *Lockyer* (*k*), after a careful investigation

(*g*) By Lord Eldon, in *Ex parte Pye*, 18 Ves. 153. See also the judgment of Wigram, V.-C., in *Suisse* v. *Lowther*, 2 Hare, 434 *et seq.*; *Re Lacon*, [1891] 2 Ch. 482; *Re Scott*, [1903] 1 Ch. 1. The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the Will, though without reference to any special application of the money: *Re Pollock*, 28 C. D. 552; *Re Ashton*, [1897] 2 Ch. 574 (reversed on appeal on the evidence, [1898] 1 Ch. 142).

(*h*) *Ward* v. *Lant*, Prec. Chanc. 182; *Jenkins* v. *Powell*, 2 Vern. 115; *Upton* v. *Prince*, Cas. temp. Talb. 71; *Scotton* v. *Scotton*, 1 Stra. 236; *Watson* v. *Lord Lincoln*, Ambl. 325; *Grave* v. *Salisbury*, 1 Bro. C. C. 427; *Carver* v. *Bowles*, 2 Russ. & M. 301; *Montague* v. *Montague*, 15 Beav. 565; 22 Beav. 488; *Hopwood* v. *Hopwood*, 7 H. L. C. 728; *Re Scott*, *ubi supra*.

(*i*) *Hartop* v. *Whitmore*, 1 P. Wms. 681; *Clarke* v. *Burgoine*, 1 Dick. 353; *Ex parte Pye*, 18 Ves. 153. Where a sum is secured by a settlement on the marriage of the child, it is not necessary that it should be paid in order to operate as an ademption of a previous legacy: *Hopwood* v. *Hopwood*, 7 H. L. C. 728.

(*k*) 5 M. & Cr. 29; *Re Pollock*, 28 C. D. 552, 556. See *Kirk* v. *Eddowes*, 3 Hare, 515. Where the advance is a gift of stock, its value must be ascertained as at the time of the gift: *Watson* v. *Watson*, 33 Beav. 576. See also *Re Beddington*, [1900] 1 Ch. 771, where it was held that when estate duty is payable by reason of the death of the testator

of all the authorities, that where the portion is less than the legacy, it shall operate only as an ademption *pro tanto*. The legacy will not be set up by a codicil, made after the settlement, ratifying and confirming the Will, and all the devises and bequests therein contained (*l*).

A sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion, but may be regarded as a temporary assistance (*m*).

The presumption against double portions will not be repelled, although there may be a difference between the nature of the provision made by the Will and of the provision under a subsequent settlement (*n*). And therefore the application of the principle of ademption will not be prevented by the circumstance that the limitations of the portion under the Will are widely different from the limitations of the portion under the settlement. This doctrine was settled by the decision of the House of Lords in *Durham* v. *Wharton* (*o*). In this respect there is a distinction between the principle of the ademption of legacies given as portions, and that of the satisfaction of debts by legacies (*p*).

within one year of the gift, the amount should be deducted from the value of the gift.

(*l*) *Booker* v. *Allen*, 2 Russ. & M. 270; *Powys* v. *Mansfield*, 3 Mylne & Cr. 359; *Montague* v. *Montague*, 15 Beav. 565; *Hopwood* v. *Hopwood*, 7 H. L. C. 728.

(*m*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Re Scott*, [1903] 1 Ch. 1 (overruling in effect, *Boyd* v. *Boyd*, L. R. 4 Eq. 305, and *Re Blockley*, 29 C. D. 250).

(*n*) *Trimmer* v. *Bayne*, 7 Ves. 508; *Ex parte Pye*, 18 Ves. 153; *Hartopp* v. *Hartopp*, 17 Ves. 184; *Sheffield* v. *Coventry*, 2 Russ. & M. 317; *Platt* v. *Platt*, 3 Sim. 503; *Phillips* v. *Phillips*, 34 Beav. 19; *Dawson* v. *Dawson*, L. R. 4 Eq. 504. Where the settlement is made after the Will the presumption against double portions will not be repelled even by great differences in the nature of the gift by Will, and the obligations entered into by the testator settlor under the settlement. The difference between such a case and the class of cases of which *Chichester* v. *Coventry* (L. R. 2 H. L. 71; *ante*, p. 1046, note (*f*)) is a leading example, is that in this last class of cases where the settlement precedes the Will a debt has been created anterior to the gift by Will and the gift has been construed not as a satisfaction of the debt, but rather as an additional bounty, especially where the Will contains an express direction for payment of debts: *Dawson* v. *Dawson*, *ubi supra*; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258; *Stevenson* v. *Masson*, L. R. 17 Eq. 78. The direction to pay debts seems immaterial where the Will precedes the settlement: *Cooper* v. *Macdonald*, *ubi supra*.

(*o*) 10 Bligh, 526; 3 Cl. & Fin. 146.

(*p*) *Monck* v. *Monck*, 1 Ball &

It was formerly considered that where the bequest to the child is of a residue or part of a residue, the subsequent advance cannot operate as an ademption: because such a gift cannot be considered as a legacy of a portion, which must mean a legacy of a definite sum (*q*). But the contrary doctrine is now fully established (*r*).

The presumption, however, will not prevail, where the testamentary portion and subsequent advancement are not *ejusdem generis* (*s*); or where the subsequent advancement depends upon

Beat. 298; *Durham* v. *Wharton*, 10 Bligh, 545. Accordingly, if a parent, having made a Will bequeathing a certain sum to a child, takes upon himself to make a settlement of it, the variance between the provisions of the Will and those of the settlement affords no argument against the portion being a satisfaction of the legacy: Where, therefore, a father makes an absolute gift by his Will to his child, and afterwards, on the marriage of that child, settles a like sum on the husband and wife and their children, the provision of the settlement is a satisfaction of the legacy: *Barry* v. *Harding*, 1 J. & Lat. 475. Again, where a legacy is given to M. with a contingent limitation over to N., in the event of M. dying without children, and the legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached; the legacy is not merely adeemed as to M., but extinguished as to N.: *Twining* v. *Powell*, 2 Coll. 262. See *Garner* v. *Holmes*, Cas. temp. Napier, 132, 133; *Phillips* v. *Phillips*, 34 Beav. 19; *M'Carogher* v. *Whieldon*, L. R. 3 Eq. 236. See, as to the rule laid down in *Chichester* v. *Coventry*, L. R. 2 H. L. 71, *ante*, p. 1046, note (*f*); and cf. *Re Tussaud's Estate*, 9 C. D. 363. For a case where the obligation under the settlement was held not to be a debt payable before the declaration of the residue, see *Bennett* v. *Houldsworth*, 6 C. D. 671.

(*q*) See *Farnham* v. *Phillips*, 2 Atk. 215.

(*r*) *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93. See also *Schofield* v. *Heap*, 27 Beav. 93; *Beckton* v. *Barton*, 27 Beav. 99. But the rules as to double portions, though to a certain extent applied to gifts of residue in *Montefiore* v. *Guedalla*, *ubi supra*, will not be applied for the benefit of a widow or stranger who may have an interest in the residue, whether an interest for life or in the capital of the residue, the object of the rule being to secure equality among the children: *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670.

(*s*) *Holmes* v. *Holmes*, 1 Bro. C. C. 555; *Davys* v. *Boucher*, 3 Y. & Coll. 411. A gift of a sum of money to the husband of a daughter by her father, *simpliciter*, after marriage, is not an ademption of a legacy given by him to his daughter: *Ravenscroft* v. *Jones*, 32 Beav. 669. Nor is an advance to the daughter herself of a sum for her marriage outfit: *ibid.* Nor occasional small gifts, nor an annual allowance of a small sum: *Watson* v. *Watson*, 33 Beav. 574; *Schofield* v. *Heap*, 27 Beav. 93.

a contingency, and the testamentary portion is certain (*t*); or where a legacy or advancement is not merely given as a portion, but is expressed to be made in lieu of, or compensation for, an interest to which the child was entitled (*u*): In such cases the presumptive ademption by advancement will not take place. It should seem, also, that the principle does not extend to devises of real estate (*x*).

Admissibility of parol evidence.

Likewise, this presumption may be rebutted or confirmed by the application of parol evidence of a different intention by the testator (*y*). And where evidence is admissible for that purpose, counter-evidence is also admissible: And it was held by Sir John Leach, M. R., in *Booker* v. *Allen* (*z*), that if it be proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of the legacy left by the Will, the settlement will be held a satisfaction of the legacy, though the two provisions differ so much from each other, that they cannot be considered substantially the same (*a*). The true rule appears to be that parol evidence is only properly admissible in such cases for the purpose of showing what the testator meant *by the act subsequent to the Will* (*b*). The law on this subject was fully considered, on an examination of all the previous authorities, by Wigram, V.-C., in *Kirk* v. *Eddowes* (*c*). In that case a testator bequeathed the sum of 3,000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint; and, in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue; and subject to an annuity, and to his debts, he devised and bequeathed all the residue of his

(*t*) *Spinks* v. *Robins*, 2 Atk. 491. See further *Crompton* v. *Sale*, 2 P. Wms. 553. But see also the observations of Lord Cottenham in *Powys* v. *Mansfield*, 3 Mylne & Cr. 374, 375.

(*u*) *Baugh* v. *Read*, 1 Ves. 257. But see the observations of Lord Lyndhurst in *Durham* v. *Wharton*, 10 Bligh, 546.

(*x*) *Davys* v. *Boucher*, 3 Younge & C. 397.

(*y*) *Trimmer* v. *Bayne*, 7 Ves. 508; *Powys* v. *Mansfield*, 3 Mylne & Cr. 359; *Hopwood* v. *Hopwood*, 7 H. L. C. 728; *Phillips* v. *Phillips*, 34 Beav. 19, 21; *Re Tussaud's Estate*, 9 C. D. 363; see *ante*, p. 1048, note (*q*); *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; *Re Scott*, [1903] 1 Ch. 1.

(*z*) 2 Russ. & M. 270.

(*a*) See also *Lloyd* v. *Harvey*, 2 Russ. & M. 310.

(*b*) *Hall* v. *Hill*, 1 Dr. & W. 94, 116—119, 131, 132.

(*c*) 3 Hare, 509; cf. *Smith* v. *Conder*, 9 C. D. 170; *Re Lacon*, [1891] 2 Ch. 482.

real and personal estate (naming securities for money) unto his son absolutely: After the date of the Will, the testator gave to his daughter and her husband a promissory note for 500*l.* then due to the testator: In a suit by the children of the daughter against the son, claiming to have the legacy of 3,000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the Will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3,000*l.*: and that the testator was advised by his solicitor, that it was not necessary to alter his Will to give it that effect: And the learned Judge held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the Will, of which subsequent transaction there was no evidence in writing: and that the parol evidence was not receivable as evidence of revocation or alteration of any part of the Will, but as evidence of a transaction, whereby the legatee had received part of her legacy by anticipation (*d*): and that the advance to the daughter and her husband was an ademption *pro tanto* of the legacy bequeathed by the Will for the benefit of the daughter and her children, which was in the nature of a portion: though it might have been otherwise, if the children had been all living at the date of the Will, and been named therein individually, and not merely described as a class.

Testator *in loco parentis* to legatee.

Where the testator is *in loco parentis* to the legatee, the legacy will be considered as a portion, and will be adeemed by a subsequent advancement, in all cases where it would be so, if made by the actual parent (*e*). But where the testator stands neither in the natural nor assumed relation of parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement (*f*); unless the legacy is given for a *particular* purpose, and the testator advances money for the

Legacy for a particular purpose

(*d*) His Honour disclaimed holding that declarations of the testator made at any other time than contemporaneously with the advance would be admissible. See also *accord. M'Clure* v. *Evans*, 29 Beav. 422.

(*e*) *Monck* v. *Monck*, 1 Ball & Beat. 298; *Trimmer* v. *Bayne*, 7 Ves. 515; *Booker* v. *Allen*, 2 Russ. & M. 270; *Powys* v. *Mansfield*, 3 Mylne & Cr. 359; *Twining* v. *Powell*, 2 Coll. 262; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

(*f*) *Wetherby* v. *Dixon*, 19 Ves. 407; *Fowkes* v. *Pascoe*, *ubi supra*.

adeemed by an advance for the same purpose.

same purpose (*g*); or unless the intention otherwise legally appear that the advancement was made with a view to ademption (*h*). A legacy to a trustee for the benefit of an infant, to whom the testator is not *in loco parentis*, is not given for a particular purpose within the above rule, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose (*i*). But a legacy to the trustees of the endowment fund of a hospital is within the rule, and is therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime (*k*).

The question, who is to be considered as standing *in loco parentis*, with reference to this rule, is one of considerable difficulty (*l*), which must in a great degree depend upon the individual circumstances of each particular case.

Definition of person *in loco parentis*.

Admissibility of parol

The proper definition of a person *in loco parentis* to a child is, a person who *means* to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child (*m*). And it necessarily

(*g*) *Debeze* v. *Mann*, 2 Bro. C. C. 166; *Monck* v. *Monck*, 1 Ball & Beat. 303; *Re Pollock*, 28 C. D. 552, 556; *Re Fletcher*, 38 C. D. 373 (where the legacy was of the amount of a debt). A legacy may be treated as intended as satisfaction of a debt, even though the debt may have ceased to exist at the death of the testator, and even though the special purpose of the legacy is not mentioned in the Will. See *Re Fletcher*, *ubi supra*, in which case North, J., says, that the case stands in precisely the same position where the existence of the purpose is founded on a presumption of law which there is no evidence to rebut, *e.g.*, the presumption that a legacy of exactly the same amount as an existing debt is given in satisfaction of the debt. See also the observations of Lord Cottenham, in *Powys* v. *Mansfield*, 3 Mylne & Cr. 377. In the following cases the legacy was held *not* to be adeemed by reason of the non-correspondence of the purposes of the legacy and the advancement: *Roome* v. *Roome*, 3 Atk. 181; *Spinks* v. *Robins*, 2 Atk. 491; *Re Ashton*, [1898] 1 Ch. 142.

(*h*) *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; *Re Fletcher*, 38 C. D. 373, 377.

(*i*) *Re Smythies*, [1903] 1 Ch. 259.

(*k*) *Re Corbett*, [1903] 2 Ch. 326.

(*l*) See the remarks of Lord Eldon in *Ex parte Pye*, 18 Ves. 150; *Bennet* v. *Bennet*, 10 C. D. 474, 477. The relation must exist at the time of the Will: *Watson* v. *Watson*, 33 Beav. 574; *Re Ashton*, [1897] 2 Ch. 574.

(*m*) *Powys* v. *Mansfield*, 3 Mylne & Cr. 359. See *Rogers* v. *Soutten*, 2 Keen, 598; *Tucker* v. *Burrow*, 2 H. & M. 519; *Campbell* v. *Campbell*, L. R. 1 Eq. 383; *Ex parte Pye*, 18 Ves. 154, *per* Lord Eldon.

evidence to prove testator *in loco parentis.*

flows from the rule of presumption that parol evidence is admissible to prove that the testator was in this predicament: For if the acts of a party standing *in loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend; viz., whether he had meant to put himself *in loco parentis;* and as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose (*n*). Mothers (*o*), great uncles (*p*), uncles (*q*), grandfathers or grandmothers (*r*), or putative fathers (*s*), are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. But a person may stand *in loco parentis* to a child, though the child resides with, and is maintained by his father (*t*). And when the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and accordingly *primâ facie* adeemed by a subsequent advancement, not only in cases where he is collaterally related to, or the putative father of, the legatee, but also where no relationship of any kind subsists between them (*u*).

(*n*) *Powys* v. *Mansfield*, 3 Mylne & Cr. 370.

(*o*) *Bennet* v. *Bennet*, 10 C. D. 474; *Re De Visme*, 2 D. J. & S. 17; *Sayre* v. *Hughes*, L. R. 5 Eq. 376; *Re Ashton*, [1897] 2 Ch. 574.

(*p*) *Shudal* v. *Jekyll*, 2 Atk. 516, 518.

(*q*) See *Powel* v. *Cleaver*, 2 Bro. C. C. 517, 518.

(*r*) *Roome* v. *Roome*, 3 Atk. 183; *Perry* v. *Whitehead*, 6 Ves. 547; *Lyddon* v. *Ellison*, 19 Beav. 565.

(*s*) *Grave* v. *Salisbury*, 1 Bro. C. C. 425, cited 6 Ves. 547.

(*t*) *Powys* v. *Mansfield*, 3 Mylne & Cr. 359, overruling the decision of the Vice-Chancellor, 6 Sim. 528.

(*u*) *Re Pollock*, 28 C. D. 552, 556. The reader is referred to 1 Roper on Legacies, 333, 3rd edit., for an able examination of the question, as to what circumstances are sufficient to invest the testator with the assumed relation of parent to the legatee, and whether parol evidence is admissible to show that the legacy by a testator, who is not actually a parent, was *intended* for a portion. Where parol testimony is given in order to rebut the presumption of ademption, (in a case where the evidence establishes the fact that the testator did mean to place himself *in loco parentis*,) it is plain that the presumption may be supported by evidence of the same kind: *Powys* v. *Mansfield*, 3 Mylne & Cr. 370. And the declarations of the party are admissible in evidence for this purpose: *Powys* v. *Mansfield*, 3 Mylne & Cr. 374.

CHAPTER THE FOURTH.

OF THE PAYMENT OF LEGACIES.

SECTION I.

All debts must be paid before any Legacies are satisfied.

IT is obvious, that as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them, before he satisfies any description of legacy.

There is no distinction, in this respect, in favour of specific legacies: Hence if an executor, although acting *bonâ fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4*l.* per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate: And the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors (*a*).

Voluntary debts.

There has already been occasion to point out, that even *voluntary* bonds and other debts by specialty, must be paid in preference to legacies (*b*).

(*a*) *Spode* v. *Smith*, 3 Russ. Chanc. Cas. 511. So property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed, more than sufficient to pay his debts, &c., and that the specifically bequeathed property has been made over by the executor to the specific legatee: *Davies* v. *Nicolson*, 2 De G. & J. 693.

(*b*) *Ante*, p. 771.

Contingent debts and liabilities:

With respect to *contingent* debts and liabilities, a question of great importance formerly arose; namely, whether an executor can safely make payment of legacies, or deliver over a residue, where there is an outstanding covenant of his testator (or bond, with a condition, or the like) which has never yet been broken, and which may or may not be broken hereafter.

Executor with notice of even a possible liability cannot safely pay legacies or residue:

This question was discussed in *Nector* v. *Gennet* (*c*), *Eeles* v. *Lambert* (*d*), *Hawkins* v. *Day* (*e*), *Pearson* v. *Archdeaken* (*f*), and the result seems to be that an executor, with notice of even a possible liability, cannot safely make payment of legacies or pay over the residue to a residuary legatee. If he does, he will have no answer to the claim of the creditor whose contingent claim has ripened into a certain claim. Thus in *Taylor* v. *Taylor* (*g*) it was held that, where executors of a shareholder in a Joint Stock Company which was a going concern at the time of the testator's death, paid a legacy under his Will without providing for any contingent liability in respect of the shares which they retained unsold, they were liable to pay the amount of the legacy in satisfaction of calls (*h*). As against the legatee, however, the executor may claim repayment of the capital sum which he has paid to the legatee, but without any intermediate income, even though he had notice of the contingent liability at the time when he distributed the estate, but not if, at the time when the legacy was paid, the contingent liability had ripened into a debt of which the executor had notice (*i*).

When a legatee must give security against contingent debts and liabilities.

Such being the law, it was held that, when such liabilities exist, an executor is not bound to part with the assets, either to a particular or residuary legatee, without a sufficient indemnity; and that a Court of Equity will not compel him to do so without such indemnity, or without impounding a sufficient part of the residuary estate for that purpose (*k*), for otherwise, if the contingent covenants, &c., should afterwards be broken, the

(*c*) Cro. Eliz. 466.

(*d*) Style, 37, 54, 73.

(*e*) Ambl. 160.

(*f*) 1 Alcock & Nap. 23.

(*g*) L. R. 10 Eq. 477. See also *Re Bewley's Estate*, 24 L. T. 177.

(*h*) See also *Knatchbull* v. *Fearnhead*, 3 M. & C. 122; *Newcastle Banking Co.* v. *Hymers*, 22 Beav. 367.

(*i*) See *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Whittaker* v. *Kershaw*, 45 C. D. 320.

(*k*) *Simmons* v. *Bolland*, 3 Mer. 547; *Vernon* v. *Eymont*, 1 Bligh, N. S. 554; *Cochrane* v. *Robinson*, 11 Sim. 378; *Fletcher* v. *Stevenson*, 3 Hare, 360, 370; *Dobson* v. *Carpenter*, 12 Beav. 370; *Hickling* v. *Boyer*, 3 Mac. & G. 635; *Dean* v. *Allen*, 20 Beav. 1.

executor would be liable to answer the damages *de bonis propriis*, without any fault in him. But a decree or order of the Court directing the administration and application of the assets is of itself a complete and perfect indemnity to the executor, provided he keeps back nothing which ought to be disclosed to the Court (*l*).

Order of the Court a complete indemnity.

As to liability under leases.

With regard to leasehold property the covenantee has no equity to apply to have a fund set apart for his indemnity (*m*). But it has been the practice of the Court, where the property comprised in the lease does not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which may in any reasonable probability arise by reason of a future breach. The effect, however, of setting apart a fund to answer future breaches of covenant is to throw a great burthen upon the residuary legatee which should not be inflicted upon him unless absolutely necessary (*n*). In *Re Nixon* (*o*), where in an administration action there had been advertisements for creditors, but no claim had been made in respect of liability under leases, which though formerly vested in the testator had not fallen to and become vested in the executors, so as to create privity of estate between them and the lessors, Byrne, J., said that in his opinion the authorities only show that it is necessary to set apart a fund for indemnity when there is privity of estate, and accordingly in that case he held that a fund ought not to be retained to the detriment of the beneficiaries under the Will.

Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 27).

By virtue of section 27 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), if the executor has sold the leaseholds and assigned them to a purchaser, he may without the order of the Court and of his own authority distribute the assets without making provision for future breach of covenant in the lease and shall not be subject to any liability (*p*). By that section it is enacted that "where an executor or administrator liable as such to the

(*l*) *Dean* v. *Allen*, 20 Beav. 1. See *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Dodson* v. *Sammell*, *ibid.* 575; *Waller* v. *Barrett*, 24 Beav. 413; *Bennett* v. *Lytton*, 2 J. & H. 155; *Addams* v. *Ferick*, 26 Beav. 384; *Williams* v. *Headland*, 4 Giff. 505; *England* v. *Tredegar*, L. R. 1 Eq. 344.

(*m*) *King* v. *Malcott*, 9 Hare, 692.

(*n*) *Brewer* v. *Pocock*, 23 Beav. 210; *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Dodson* v. *Sammell*, *ibid.* 575; referred to in *Hardy* v. *Fothergill*, 13 App. Cas. at p. 370.

(*o*) [1904] 1 Ch. 638.

(*p*) *Dodson* v. *Sammell*, *ubi supra*.

rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease, as may have accrued due, and been claimed, up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease: and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease and having, where necessary, set apart, such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the lease or agreement for a lease: but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." This section has been held to be retrospective (*q*).

As to liability in respect of covenants in conveyances.

By section 28 similar provisions are made as to the liability of an executor in respect of covenants in conveyances or chief rent or rent-charge.

But it has always been held that an executor, who has assented unconditionally to a specific bequest of the testator's leasehold estates, is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the leases. Consequently, if the executors assign the leaseholds to the legatee (whether specific or residuary), they lose their right to an indemnity out of the general estate (*r*).

Right of creditors to follow assets.

It may here be mentioned, that the old practice of the Court of Chancery was, that the legatee should in all cases give the

(*q*) *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Re Green*, 2 De G. F. & J. 121.

(*r*) *Shadbolt* v. *Woodfall*, 2 Coll. 30. See *Hickling* v. *Boyer*, 3 Mac. & G. 635, 646; *Smith* v. *Smith*, 1 Drew. & Sm. at p. 387.

executor security to refund, if debts should afterwards appear (*s*). Afterwards the Court ceased to require such security (*t*); and since then creditors have been allowed, in Courts of Equity, to follow assets in the hands of legatees, as well as of the executor (*u*).

Payment of legacies before debts of which an executor has no notice.

Another question arises, of great importance, and closely connected with the preceding inquiry, viz., whether, under any circumstances, an executor or administrator can be allowed payments made to legatees, or parties entitled in distribution, as against creditors of whose claims he had no notice.

The question was discussed in the cases of *The Governors of the Chelsea Water Works* v. *Cowper* (*x*), *Norman* v. *Baldry* (*y*), *Smith* v. *Day* (*z*), *Knatchbull* v. *Fearnhead* (*a*), and *Hill* v. *Gomme* (*b*), and these authorities appear to demonstrate, that the mere circumstance of want of notice of a death or claim against the estate of the deceased will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he has *bonâ fide* handed over the assets to legatees or parties entitled in distribution. But it seems to have been considered, in some cases, that lapse of time may operate as a waiver of the right of the creditor or claimant, by way of *laches* on his part, so as to preclude him from complaining of the insufficiency of the assets (*c*); and Tindal, C. J., in *Richards* v. *Brown* (*d*), says, that if, in the distribution of assets, a creditor does mislead an executor, either by *laches* or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*e*).

(*s*) *Chamberlain* v. *Chamberlain*, 1 Chanc. Cas. 257; *March* v. *Russell*, 3 Mylne & Cr. 41, 42.

(*t*) Anon. 1 Atk. 491.

(*u*) By Lord Hardwicke in *Hawkins* v. *Day*, Harg. MSS. Ambl. 804 Blunt's edit.; *March* v. *Russell*, 3 Mylne & Cr. 42; *post*, p. 1189.

(*x*) 1 Esp. N. P. C. 275.

(*y*) 6 Sim. 621.

(*z*) 2 Mees. & W. 684.

(*a*) 3 Mylne & Cr. 122.

(*b*) 1 Beav. 540.

(*c*) *Davis* v. *Blackwell*, 9 Bingh. 5.

(*d*) 3 Bingh. N. C. 493.

(*e*) See *Stroud* v. *Stroud*, 7 M. & Gr. 417, 421. But Tindal, C. J., does not, although he uses the term *laches*, mean that the mere doing nothing will deprive the creditor of his right to complain of a *devastavit*. There must be such a course of conduct or express authority whereby the executors have been misled into parting with assets available for payment of the

The hardship on the executor has been much mitigated by stat. 22 & 23 Vict. c. 35, s. 29, which provides that "where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate (*f*), such executor or adminis-

22 & 23 Vict. c. 35, s. 29: After notice to send in claims, &c., executor not to be liable for debts, after distribution of the assets, of which he had not then notice.

creditor's claim: *Re Birch*, 27 C. D. 622; *Jewsbury* v. *Mummery*, L. R. 8 C. P. 60; *Richards* v. *Browne*, 3 Bingh. N. C. 493. And there is no rule in equity any more than in law that mere non-suing for any period within the time limited by the Statute of Limitations deprives a creditor of the right of requiring payment: *Re Baker*, 20 C. D. 230. See also *Rochefoucald* v. *Boustead*, [1897] 1 Ch. 196, 210; and *Re Gallard*, [1897] 2 Q. B. 8.

(*f*) An executor who has distributed the assets of his testator after issuing advertisements and taking the steps pointed out by the Act, will have the same protection as if he had administered the estate under a decree of the Court, and if he should have retained any legacies as trustee after appropriating them for the benefit of the *cestui que trusts* he will no longer be under any liability *quâ* executor. See *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *Hunter* v. *Young*, 4 Ex. Div. 256. But an executor with notice of a claim against his testator's estate is not discharged by the fact that the person entitled to make the claim has failed to send in particulars in answer to the statutory advertisements: *Re Land Credit Company of Ireland, Markwell's Case*, 21 W. R. 135.

The executors of a testator whose estate was liable to replace trust money in consequence of a breach of trust, having only issued notices for claims against the testator's estate to be sent in within three weeks, by advertisements in local newspapers in the neighbourhood where the testator resided and not in the *London Gazette*, was held by Lord Romilly, M. R., not to be protected from liability under the above section: *Wood* v. *Weightman*, L. R. 13 Eq. 434. It has, however, been held by North, J., in *Re Bracken*, 43 C. D. 1, that there is no absolute rule that notices issued by executors under the Act to creditors and others should (as was contended in that case) be published in a London daily newspaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether executors have given such notices as are sufficient to entitle them to the protection of the section the Court will have regard to the circumstances of the particular case, such as the place of residence of the testator and his position in life.

The provisions of sect. 29 are not confined to claims of *creditors* of the testator or intestate, but apply also to persons having claims as *next of kin*: *Newton* v. *Sherry*, 1 C. P. D. 246.

See Ord. LV. rr. 44—61 (R. S. C. 1883) for the notices which would have to be given in an administration action.

trator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

How far a creditor's priority over legatees may be barred in a suit for the administration of assets.

In conclusion of this subject, it may be proper to consider how far the laches of the creditor may affect his priority over legatees, where there is a suit for the administration of testator's assets. Ord. LV. r. 44, of the R. S. C. provides that "where a judgment or order is given or made, whether in Court or in chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, shall be excluded from the benefit of the judgment or order."

Notwithstanding the language of this rule, and formerly the language of the judgment excluding those who do not come in from the benefit of the judgment or order in any action for the administration of an estate in Chancery, a creditor is as a rule allowed to come in after a certificate of debts has been made and share in the administration of any assets remaining undistributed, but upon such terms as the Court thinks fit to impose (*g*). There is also a similar rule in bankruptcy which is applicable in the administration of an insolvent estate by virtue of sect. 10 of the Judicature Act, 1875.

Rule 57 of Ord. LV. however provides that "After the time fixed by the advertisement no claims shall be received (except as hereinbefore provided in case of an adjournment),

(*g*) See *per* Lord Eldon in *Gillespie* v. *Alexander*, 3 Russ. Chanc. Cas. 136; *March* v. *Russell*, 3 Mylne & Cr. 41; *Hartwell* v. *Colman*, 16 Beav. 140; and the observations of Lord Lyndhurst in *Vernon* v. *Egmont*, 1 Bligh, N. S. 570; also *Re M'Murdo*, [1902] 2 Ch. 684; 71 L. J. Ch. 691; *Harrison* v. *Kirk*, [1904] A. C. 1.

unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit (*h*).

If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred from the benefit of that judgment: If he chooses to sue the legatees and bring back the fund he may do so (*i*): but he cannot affect the legatees, except by suit; and he cannot affect the executor at all where the distribution has been under the order of the Court or after advertisement in pursuance of the statute; and consequently in either of these events the executor is not a proper party to any subsequent proceeding against the legatees (*k*).

A point of considerable difficulty arises if a creditor does not come in until some individual legatees have received their legacies in full under the sanction of the Court, and there are left in Court certain funds which have been directed to be appropriated to other individual legatees, who have not been paid: The question then is, whether a creditor, so coming in, is to be paid his whole debt by the unpaid legatees: or whether the rule is not, that he should take from them such a proportion only of his debt as would have been borne by them if he had

(*h*) Under the old practice it would seem that, after report settled, though not signed, in a creditor's suit, a creditor could not be let in to prove his debt without a special application to the Court; and he must submit to be visited with costs and pay the usual penalty for default: *Parker* v. *Morley*, 3 Y. & C. 720. But see *Lee* v. *Flood*, 2 Sm. & G. 250.

(*i*) See *post*, p. 1189; *David* v. *Frowd*, 1 M. & K. 209, 210; *Sawyer* v. *Birchmore*, 1 Keen, 401; 2 Mylne & Cr. 611; *March* v. *Russell*, 3 Mylne & Cr. 31; *Underwood* v. *Hatton*, 5 Beav. 36. Persons claiming as next of kin have similar rights to those established in favour of creditors by *David* v. *Frowd*, *ubi supra*. Where an intestate's estate had been distributed under a decree in an administration suit among persons found by the report to be his next of kin, it was held that a person claiming to be sole next of kin was not precluded from filing a bill against the persons alleged to have been erroneously found to be the next of kin for the purpose of obtaining restitution of the fund so distributed. Acquiescence or laches may, however, disentitle such a person to maintain the action: *Mohan* v. *Broughton*, [1899] P. 211.

(*k*) *Gillespie* v. *Alexander*, 3 Russ. Chanc. Cas. 136, 137; *David* v. *Frowd*, 1 M. & K. 209, 210; *Seale* v. *Buller*, 2 Giff. 312; *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *Hunter* v. *Young*, 4 Ex. D. 256.

applied before the other legacies were paid, and that he should be left to recover the residue of it against the paid legatees: In the case of *Gillespie* v. *Alexander* (*l*) (which was a suit for the administration of a testator's assets), after a decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in Court to be apportioned among the other legatees, a creditor obtained permission to prove his debt: The Master subsequently reported a debt to be due to him; but in the meantime the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees, who were infants: And Lord Eldon held, that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the Will; and that he must seek the payment of the rest of his debt, in proper proportions, amongst those legatees who had been actually paid (*m*).

In *Greig* v. *Somerville* (*n*), in a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account: In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in Court; and the plaintiff coming of age soon after, applied to have that sum paid out: And Lord Lyndhurst held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every

(*l*) 3 Russ. Chanc. Cas. 130.

(*m*) See *David* v. *Frowd*, 1 M. & K. 210, by Sir J. Leach, M. R. Where a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive rateable proportions of it according to the proportion which their debts bear to the total amount of the debts.

(*n*) 1 Russ. & M. 338.

defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in Court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff (*o*).

The rule applied in *Gillespie* v. *Alexander* and *Greig* v. *Somerville* is not, however, applicable where the estate has not been administered by the Court (*p*).

SECTION II.

Of the Abatement of Legacies.

In case of deficiency of assets, general legatees must abate before specific:

1. As to the abatement of general legacies. In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.

This abatement must take place among all the general legatees in equal proportions (*q*): And the executor has no

(*o*) The general rule then being that mere delay does not prevent a creditor coming in to prove while there are assets in hand: *Brown* v. *Lake*, 1 De G. & Sm. 144. The question in each case seems to be whether there is anything to take it out of the general rule. Thus in *Cattell* v. *Simons*, 8 Beav. 243, a bond creditor had proved his debt and also claimed to have an equitable mortgage for the amount. The matter having stood over for amendment by the creditor and he, through his neglect to amend, being reported as a bond creditor only, the estate was sold, the money paid into Court, and an apportionment directed. Nine years afterwards his personal representative presented a petition for liberty to go in and establish his mortgage, alleging that he had recently discovered that the amendment had not been made; it was dismissed with costs. On the other hand, in *Re Metcalfe*, 13 C. D. 236, a creditor who had obtained an order for raising the amount which he then claimed out of a testator's realty, was afterwards allowed, the assets being undistributed, to obtain an order by way of amendment, increasing the amount to be raised, although he had in his possession, at the time of obtaining the first order, a book which, if he had known of the existence of a particular entry, would have supplied the information on which the claim to amend was based. Cf. also, *Re McMurdo*, [1902] 2 Ch. 684.

(*p*) *Davies* v. *Nicolson*, 2 De G. & J. 693.

(*q*) Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5. With regard to general legacies of stock, the abatement will be regulated by the value of stock at the end of one year next after

power to give himself a preference in regard to his own legacy, as he has in the instance of his own debt (*r*).

Generally speaking, nothing shall, in such cases, be abated from the specific legacies (*s*). But if the testator bequeaths specific legacies, and also general pecuniary legacies, and directs by his Will that such pecuniary legacies shall come out of all his personal estate, or words tantamount; then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise, the words of the bequest to the pecuniary legatees would be nugatory (*t*).

but a residuary legatee cannot call on them to abate

It must here be observed, that a *residuary* legatee has no right to call upon particular general legatees to abate: The whole personal estate not specifically bequeathed must be exhausted, before those legatees can be obliged to contribute anything out of their bequests (*u*).

So if there is a simple bequest of an annuity, there is no doubt but that, however great or small the income of the testator's property may be, the annuity must be paid in full to the last farthing of the property (*x*). But the provisions of the Will as to the payment of the annuity may be such as to show an intention, on the part of the testator, that the annuity shall only come out of the income of the fund or estate, and not out of the *corpus* or capital. The general rule is, that if there be a clear gift of a life interest and a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest: But if there is a gift of an annuity, and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee (*y*).

the testator's death: *Blackshaw* v. *Rogers*, cited *per curiam* in *Simmons* v. *Vallance*, 4 Bro. C. C. 349. *Auther* v. *Auther*, 13 Sim. 440, *per* Shadwell, V.-C.

(*r*) Toller, 347.

(*s*) Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5; *Clifton* v. *Burt*, 1 P. Wms. 676; 2 Black. Com. 513; Toller, 339.

(*t*) *Sayer* v. *Sayer*, Prec. Chanc. 393; Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5.

(*u*) *Purse* v. *Snaplin*, 1 Atk. 418; *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 478. See *Harley* v. *Moon*, 1 Dr. & Sm. 623; *Baker* v. *Farmer*, L. R. 3 Ch. 537.

(*x*) *Croly* v. *Weld*, 3 De G. M. & G. 993, 996, by Knight Bruce, V.-C.

(*y*) *Ibid.* 995, by Lord Justice Turner; *post*, p. 1090, n. (*a*). The following are cases in which annuities have been held payable out of the *corpus* or capital of the testator's estate: *Miller* v. *Huddlestone*, 17 Sim. 71; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Croly* v. *Weld*, *ibid.* 993; *Miner* v. *Baldwin*, 1 Sm. & G. 522;

In *Farmer* v. *Mills* (*z*), a testator, by his Will, bequeathed certain annuities, and directed that sums set apart to secure

Mills v. *Drewett*, 20 Beav. 636; *Perkins* v. *Cooke*, 2 J. & H. 393; *Hickman* v. *Upsall*, 2 Giff. 124; *Howarth* v. *Rothwell*, 30 Beav. 516; *Bright* v. *Larcher*, 3 De G. & J. 48; *Upton* v. *Vanner*, 1 Dr. & Sm. 594; *Phillips* v. *Gutteridge*, 32 L. J. Ch. 1; *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Pearson* v. *Helliwell*, L. R. 18 Eq. 411; *Re Hedges' Trust*, L. R. 18 Eq. 419; *Michell* v. *Wilton*, L. R. 20 Eq. 269; *Re Mason*, 8 C. D. 411; *Carmichael* v. *Gee*, 5 App. Cas. 588, *sub nom. Gee* v. *Mahood*, 11 C. D. 891, reversing *S. C.*, 9 C. D. 151; *Re Tucker*, [1893] 2 Ch. 323. The following are cases in which they were held payable out of *income*: *Tarbottom* v. *Earle*, 11 W. R. 680; *Bague* v. *Dumergue*, 10 Hare, 462; *Hindle* v. *Taylor*, 20 Beav. 109; *Baker* v. *Baker*, 6 H. L. C. 616 (reversing *S. C.*, 20 Beav. 548; 7 De G. M. & G. 681); *Stelfox* v. *Sugden*, Johns. 234; *Booth* v. *Coulton*, L. R. 5 Ch. 684; *Taylor* v. *Taylor*, L. R. 17 Eq. 324; *Wormald* v. *Muzeen*, 45 L. T. 115; 50 L. J. Ch. 776; 29 W. R. 795 (C. A.), reversing *S. C.*, 17 C. D. 167. The question may generally be put in the terms used by Lord Gifford in *May* v. *Bennett*, 1 Russ. 370, viz., whether the bequest is to be considered as a bequest of an annuity or as the bequest of the income (or part of the income) of a sum directed to be set apart. The case of *Wright* v. *Callender*, 2 De G. M. & G. 652, is an instance of the former class; *Baker* v. *Baker*, *ubi supra*, is an instance of the latter. If the gift is of an annuity not so limited as to make it payable exclusively out of the income of a particular fund during the annuitant's lifetime, it will be a charge on the *corpus* to the loss of those interested in the residuary estate. If, on the other hand, what is bequeathed is the income of a particular fund, then, if the income does not come up to the expectation of the testator, the annuitant will have to bear the loss: *Carmichael* v. *Gee*, 5 App. Cas. 588, 597, in which case Lord Selborne says that *Miller* v. *Huddlestone*, L. R. 6 Eq. 65, if rightly decided, depended on the special language of a very special Will. The mere fact that the gift of an annuity is followed by a direction to set apart a fund to secure it, will not cut down the right of an annuitant to a right to receive only the income of fund: *Re Mason*, 8 C. D. 411. A provision that the fund out of which the annuity is directed to be paid shall fall into the residue after the death of the annuitant, is an indication that the testator meant to bequeath an *annuity*: *May* v. *Bennett*, *ubi supra*; *Wright* v. *Callender*, *ubi supra*. A provision for the destination of the surplus income during the life of the annuitant goes to show that the annuity is a charge on the income only: *Wormald* v. *Muzeen*, 45 L. T. 115; 50 L. J. Ch. 776; 29 W. R. 795, reversing *S. C.*, 17 C. D. 167; *Stelfox* v. *Sugden*, Johns. 234, 240. Where a testator directs that out of the income of a fund invested or to be invested a life annuity is to be paid, and there is no direction that the annuity is to be paid out of income to accrue in the lifetime of the annuitant, the annuity is a charge on the income, even after the death of the annuitant, until the arrears of the annuity are satisfied: *Booth* v. *Coulton*, L. R. 5 Ch. 684.

(*z*) 4 Russ. 86.

them, should, as the annuitant died, sink into the residue of his personal estate: By a codicil to his Will, he stated, that in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: And it was held by Sir John Leach, M. R., that upon the death of any annuitant, the sum, set apart to secure the reduced annuity, would belong to the residuary legatees, and was not to be applied to increase the reduced annuities to the amount given by the Will: His Honour, however, observed, that if the case had rested upon the Will, the residuary legatees could have taken no benefit, until the annuities were fully provided for (*a*).

In *Arnold* v. *Arnold* (*b*), a testator desired that A., B., and C. might each enjoy, during life, the interest of 800*l.* sterling, the

(*a*) In *Scott* v. *Salmond*, 1 M. & K. 363, a testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value; and he gave the fund itself over to another person for life, upon the respective deaths of the annuitants: The fund having proved deficient, and the annuitants having suffered a proportional abatement, it was held by Sir J. Leach, M. R., and afterwards by Lord Brougham, on appeal, that on the death of one of them, the income from the fund released by the falling in of her annuity went over to the tenant for life, and was not applicable to make good the deficiency of the continuing annuities. See also *Page* v. *Leapingwell*, 18 Ves. 463; *Miller* v. *Huddlestone*, L. R. 6 Eq. 65; *Re Lyne's Estate*, L. R. 8 Eq. 482; *Re Tootal's Estate*, 2 C. D. 628. See also *Wright* v. *Weston*, 26 Beav. 429. But where a testator, having a power of appointment by Will over a sum of stock, bequeathed two sums of 5,000*l.* and 500*l.* sterling thereout to A. and B., and the residue to his son; and the stock became in Equity liable to his debts, and by payment thereof, and of the costs of the suit, the fund became less than 5,500*l.* sterling, it was held by Romilly, M. R., that the pecuniary and residuary legatees were not liable to abate proportionally, but that the residuary gift failed altogether: *Petre* v. *Petre*, 14 Beav. 971. See also *Harley* v. *Moon*, 1 Drew. & Sm. 623. The question would seem to be, does the testator deal with a given sum which he assumes to be available, or does he not. If a man dealing with a sum of stock or a specific amount says, "I bequeath so much to A., so much to B., and the rest to C.," the fund must be divided in those exact proportions, and if the stock falls short the loss must be apportioned amongst all the legatees in the same proportion: but if the testator is not dealing with a specific amount, or does not assume to be so doing, the loss will fall on the residuary legatee: *Elwes* v. *Causton*, 30 Beav. 554; *De Lisle* v. *Hodges*, L. R. 17 Eq. 440.

(*b*) 2 M. & K. 374.

principal to devolve eventually to his residuary legatees: He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue: The testator's estate was not sufficient to pay the legacies in full: And Sir C. Pepys, M. R., held, that upon the death of one of the tenants for life an apportionment of the legacy of 800*l.*, set apart to answer her life interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund: And his Honour observed, on *Farmer* v. *Mills* (*c*) being cited, that in that case the testator's codicil expressly provided that the annuities should be rateably reduced; and that, but for that codicil, the residuary legatees could have taken no benefit until the annuities were fully paid.

Rights of residuary legatee in case of deficiency through devastavit of executor.

A point of considerable difficulty arises in cases where there are pecuniary legatees and a residuary legatee, and *by reason of the devastavit of the executor* the estate becomes insufficient to pay all the pecuniary legacies: The question then is, whether, there being at the testator's death a residue of a certain sum, the residuary legatee is not entitled to rank as a legatee of that sum.

In *Dyose* v. *Dyose* (*d*), Lord Cowper, in the instance of deficiency by a *devastavit*, held, that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the death of the testator left a residue; and that the wreck of the estate, which could be recovered after the *devastavit*, was divisible, not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

But this decision came under the consideration of Lord Thurlow, in the cases of *Foncreau* v. *Poyntz* (*e*), and *Humphreys* v. *Humphreys* (*f*); on both which occasions his lordship con-

(*c*) *Ante*, p. 1089.

(*d*) 1 P. Wms. 305.

(*e*) 1 Bro. C. C. 478.

(*f*) 2 Cox, 186.

demned the doctrine of it: And this condemnation was approved by Sir William Grant in *Page* v. *Leapingwell* (*g*).

On the other hand, in *Ex parte Chadwin* (*h*), Lord Eldon, after reviewing all the preceding authorities, seems to consider the question as unsettled: and his decree in that case may, perhaps, be considered as in some measure confirmatory of *Dyose* v. *Dyose*, though certainly on a totally different principle. But in *Baker* v. *Farmer* (*i*), Sir W. Page Wood, L. J., observed that *Dyose* v. *Dyose* cannot be relied on, after the observations which have been made upon it by subsequent judges, to prove that a residuary legatee can be allowed to come in *pari passu* with other legatees in case of a deficiency of assets.

The case above mentioned, of *Ex parte Chadwin* (*k*), is an authority to show that a legatee, entitled to a priority, may have so dealt, in respect to his legacy, with an executor guilty of a *devastavit*, as to lose all priority, and to render it just, that the estate should be divided as if no *devastavit* had taken place: There the testator directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for W. C., and upon further trust, out of the residue of the money, to invest 400*l.* in trust for J. R. for life, and after his death for his children; and upon further trust, to pay other sums to persons named; and he bequeathed the residue of his estate to W. C.: The only acting executor made no investment on the trust of the Will, but paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards became bankrupt: Lord Eldon was of opinion, that, by so dealing with the executor, these two legatees had made him their debtor for their legacies respectively: And upon that ground his lordship decreed, that the dividends payable upon the whole sum proved under the commission against the executor in respect of the testator's estate should be divided among the pecuniary and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each.

In *Willmott* v. *Jenkins* (*l*), an executor, who was also trustee, divided the assets: He paid to the adult legatees their shares,

(*g*) 18 Ves. 466. (*h*) 3 Swanst. 387. (*i*) L. R. 3 Ch. 537.
(*k*) 3 Swanst. 380. (*l*) 1 Beav. 401.

and invested the shares of the infants in his own name, but he executed no declaration of trust thereof: He afterwards applied these sums to his own use: Further assets having unexpectedly fallen in, Lord Langdale, M. R., held that they ought, in the first place, to be applied in making good the infants' legacies: And the learned Judge said, that if an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such appropriation as is equivalent to payment, the other persons entitled under the Will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated (*m*); but that if there be no payment, and no appropriation equivalent to payment, his Lordship did not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees (*n*).

Priority, among general legatees, of purchasers over volunteers:

The general rule is, that, among legacies in their nature general (according to the distinctions attempted to be pointed out in a previous chapter) there is no preference of payment: they all abate together, and proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow (*o*), such legacy will be entitled to a preference of payment over the other general legacies, which

(*m*) See *Morris* v. *Livie*, 1 Y. & Coll. Ch. C. 380, *post*, pp. 1136, 1137.

(*n*) Where there has been no consent of the legatees to the special appropriation of the fund out of which their legacies are payable, the ordinary rule that the residuary legatee can take nothing till all the pecuniary legatees have been paid must prevail: *Baker* v. *Farmer*, L. R. 3 Ch. 537 (reversing Malins, V.-C., L. R. 4 Eq. 382); *Harley* v. *Moon*, 1 Dr. & Sm. 623.

(*o*) *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Heath* v. *Dendy*, 1 Russ. Ch. C. 543; *Norcott* v. *Gordon*, 14 Sim. 258. But such a legacy has no priority, where the testator leaves no real estate out of which the widow is dowable: *Acey* v. *Simpson*, 5 Beav. 35; or where the only real estate of the testator was conveyed to him with a declaration against dower: *Roper* v. *Roper*, 3 C. D. 714. The decision of Malins, V.-C., in this case was subsequently approved by Chitty, J., in *Re Greenwood*, [1892] 2 Ch. 295, 299, although he dissented from the dictum of the Vice-Chancellor that, if the dower had been barred by the Will, the widow would have been entitled to priority.

are mere bounties (*p*); and it would seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee (*q*). But it is requisite that the right or interest should be subsisting at the testator's death (*r*).

In *Heath* v. *Dendy* (*s*), the testator, having by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific legacies, and also a general legacy, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim: The assets proved insufficient for the payment of the legacies in full: And Lord Gifford, M. R., held, that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legacies: His Lordship, in giving judgment, observed, that if, at the death of the testator, his widow had not been entitled to dower, then, according to the principle of the previous authorities, she could not have claimed any priority: But, at his death, her right to dower was in full force; and she was to release her dower, not merely for the provision which the settlement made, but for that provision taken in conjunction with the legacy: It was not material whether the sum bequeathed was or was not the whole of the consideration for the release of the dower: If it was only part of the consideration, she was nevertheless a purchaser of the sum, and was entitled to priority over the other legatees (*t*).

In *Davies* v. *Bush* (*u*), a testator had bequeathed a legacy to a person, between whom and himself accounts had subsisted for some time, on condition of his executing to the testator's executors a general release of all claims and demands which the legatee had on the testator: The legatee executed the release:

(*p*) Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5.

(*q*) Ambl. 244.

(*r*) *Blower* v. *Morret*, 2 Ves. Sen. 422.

(*s*) 1 Russ. 543.

(*t*) It is enacted by stat. 3 & 4 Will. IV. c. 105 (Act for the amendment of the Law relating to Dower), s. 12, that nothing in this Act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. See *Re Greenwood*, [1892] 2 Ch. 295.

(*u*) 1 Younge, 341.

The assets were insufficient for the payment of all the legacies; and the question was, whether this particular legatee was, by the execution of the release, a purchaser of his legacy, and entitled to be paid in preference to the other legatees; or whether he was bound to abate rateably with them: It did not appear whether the legatee had any legal claim or demand on the testator: Lord Lyndhurst, C. B., was of opinion, that if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees: If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee could not be treated as a purchaser.

General legacies, bequeathed to creditors, whose debts have been previously liquidated by composition at less than their real amounts, are merely voluntary, and therefore not exempt from abatement together with other general legacies upon a deficiency of assets (*x*). So where the testator bequeaths money to pay the debts of a relation or friend, such legacies must be considered as bounties, and in no better condition than other general legacies (*y*).

instances where priority among general legatees is not allowable:

It must here be observed, that a legacy, which is, in its nature, general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of its being applied to any particular object or purpose: Thus legacies of a certain sum each to executors for their care and trouble (*z*), or of sums of money for mourning rings (*a*), or to servants (*b*), or to charities (*c*), are not to be preferred to other general legacies.

(*x*) *Coppin* v. *Coppin*, 2 P. Wms. 296. See *Turner* v. *Martin*, 7 De G. M. & G. 429, *ante*, p. 957, note (*q*). See, however, *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449, 451, for a discussion of the circumstances under which the compromise of a disputed claim is a good consideration for a promise; and compare with that case, *Ex parte Banner*, 17 C. D. 480, 490; and *Miles* v. *New Zealand Alford Estate Co.*, 32 C. D. 266; *Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309.

(*y*) *Shirt* v. *Westby*, 16 Ves. 396.

(*z*) *Duncan* v. *Watts*, 16 Beav. 204. See also *Re White*, [1898] 2 Ch. 217.

(*a*) *Apreece* v. *Apreece*, 1 Ves. & Beam. 364. In *Masters* v. *Masters*, 1 P. Wms. 423, Lord Parker exempted a legacy of a certain sum for building a monument to the memory of a relation from abating with the general legacies; but this decision has been doubted on strong grounds: See *Blackshaw* v. *Rogers*, cited 4 Bro. C. C. 349.

(*b*) *Att-Gen.* v. *Robins*, 2 P. Wms. 25.

(*c*) *Att-Gen.* v. *Hudson*, 1 P. Wms. 675; *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 566.

And although the bequest is made in favour of a wife or child of the testator, it can claim no preference, but must abate with the rest of the general legacies (*d*).

annuity charged on personal estate is a general legacy.

Again, an annuity charged on the personal estate is a general legacy (*e*). And, therefore, as between annuitants and legatees, there is no priority where there is a deficient estate, but both must abate proportionably. And whether an annuity is to commence immediately on the death of the testator or at a future period, this principle will equally apply (*f*). And if annuities abate with reference to other legacies, they must, of course, abate between themselves. In *Innes* v. *Mitchell* (*g*), a testator had bequeathed an annuity of 300*l.* to his three daughters, and the survivors and survivor, with a gift over to the last survivor of the sum set apart to answer the annuity: After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, became available: And it was held, that the annuity must be supposed to have continued until it was put an end to by the principal money falling in; and that such money must be apportioned rateably between the arrears which would, on that supposition, be due to the

(*d*) *Blower* v. *Morret*, 2 Ves. Sen. 420. Unless from the construction of the Will it appears that the testator has shown intention to give priority to a particular legacy: *Re Hardy*, 17 C. D. 798. In the case of *Re Hardy*, Malins, V.-C., seems to have said, "*Blower* v. *Morret* is in my opinion distinguishable in many respects, but if it is not, then I say I dissent from it and decline to follow it." In the case of *Re Schweder's Estate*, [1891] 3 Ch. 44, Chitty, J., said, "In my opinion *Re Hardy* was not distinguishable from *Blower* v. *Morret*, and with all due respect to the learned Vice-Chancellor (who decided it) he was bound by it. I think I am constrained by *Blower* v. *Morret*, and by the continued course of the authorities since that decision, to dissent from *Re Hardy*, as I do."

(*e*) *Innes* v. *Mitchell*, 1 Phil. Ch. C. 716, *per* Lord Lyndhurst; 11 Cl. & F. 508, *per* Lord Cottenham; *Miller* v. *Huddlestone*, 3 Mac. & G. 513. But if annuities are given as specific gifts of interest in the real estate, they shall not abate with legacies charged generally on the real estate: *Creed* v. *Creed*, 11 Cl. & F. 491 (overruling the decision of Sugden, C., of Ireland, 1 Dr. & W. 416).

(*f*) *Innes* v. *Mitchell*, 1 Phil. Ch. C. 716.

(*g*) 2 Phil. Ch. C. 346, reversing in part the decision 1 Phil. Ch. C. 710.

daughters respectively, and the sum originally set apart, and which belonged to the last survivor (*h*).

Where deficient estate is being administered by the Court the annuity is valued and the amount subject to abatement paid at once to the annuitant.

Where the deficient estate is being administered under an order of the Court, but not otherwise (*i*), the annuity ought to be valued, and the annuitant will be entitled at once to the amount of the valuation subject to an abatement in proportion to the abatement of the pecuniary legacies (*k*), notwithstanding the annuity itself was payable for life or until the annuitant should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person (*l*). In *Re Ross* (*m*), where the annuitant was a married woman restrained from anticipation, and was entitled as from the death of the testator to a dividend in proportion to the capitalized value of the annuity, the Court for convenience directed the purchase of a Government annuity on the life of the annuitant with such capitalized value; she died after the amount was fixed but before the annuity was actually purchased, and it was held that her surviving husband, as her representative, was entitled to receive the capital.

Instances where priority among general legatees is allowable.

But if by the express words or fair construction of the Will, the intent of the testator is clearly manifest to give one general legatee a priority to the others, that intention must be carried into effect (*n*): as where the testator gave legacies to his two sons and his daughter, with a proviso, that if the assets should fall short for the satisfaction of those legacies, his daughter not-

(*h*) See also *Todd* v. *Bielby*, 27 Beav. 353, as to the proper mode of ascertaining the value of the annuities, in a case where several annuities are given, and the fund proves deficient, and some of the annuitants are dead and some are living: *Heath* v. *Nugent*, 29 Beav. 226. See also *Potts* v. *Smith*, L. R. 8 Eq. 683; *Re Wilkins*, 27 C. D. 703; *Re Metcalf*, [1903] 2 Ch. 424. As to the period at which the value must be taken, see *Fielding* v. *Preston*, 1 De G. & J. 438.

(*i*) *Re Nicolson's Estate*, I. R. 11 Eq. 177, on a sale of lands charged with an annuity an order was made that the annuitant should be at liberty to apply from time to time to have the annuity paid in the first instance out of the dividends of stock set apart to provide for the annuity, and any deficiency of dividends provided for by sale of the stock: approved in *Re Owen's Estate*, [1900] 1 I. R. 151, 161.

(*k*) *Wroughton* v. *Colquhoune*, 1 De G. & Sm. 357; *Carr* v. *Ingleby*, *ibid.* 362, note; *Long* v. *Hughes*, *ibid.* 364.

(*l*) *Re Sinclair*, [1897] 1 Ch. 921, not following *Carr* v. *Ingleby*, *ubi supra*, on this point, and distinguishing *Gratrix* v. *Chambers*, 2 Giff. 321.

(*m*) [1900] 1 Ch. 162.

(*n*) *Lewin* v. *Lewin*, 2 Ves. Sen. 415; *Re Hardy*, 17 C. D. 798, 803.

withstanding should be paid her full legacy, and the abatement be borne proportionally by the legacies of the sons only (*o*). So where the testator, after giving various legacies, expressed at the end of his Will his apprehension that there would be a considerable surplus of his personal estate, beyond what he had before given away in legacies, for which reason he gave several further legacies; and afterwards, by a codicil, he gave several other legacies; it was decreed, that the subsequent legacies given by the Will, having been given on a presumption that there would be a surplus, and there happening to be no surplus, the former legacies should have a preference, and the legacies at the end of the Will should be lost; and also, that the same apprehension of a surplus must be intended to have continued in the testator at the time of making his codicil: and therefore, unless the inference could be repelled, the legacies given by the codicil must be lost also (*p*). Again, where a testator gave 1,000*l.* to trustees upon trust to pay the interest to his wife, during her life, and after her decease he declared his will to be, that the 1,000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his Will; and he gave a legacy of 500*l.*, in trust for N. M. and his wife, in nearly the same words; it was held, that a priority was given to these two legacies (*q*).

But the *onus* lies on the party seeking priority, to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive (*r*). The reason of it is, that the testator, in the absence of plain proof to the contrary, must

(*o*) *Marsh* v. *Evans*, 1 P. Wms. 668.

(*p*) *Att.-Gen.* v. *Robins*, 2 P. Wms. 23. See also *Stammers* v. *Halliley*, 12 Sim. 42.

(*q*) *Brown* v. *Brown*, 1 Keen, 275. There would seem to be no presumption of an intention to give priority to a wife or children before strangers, notwithstanding the observations of Malins, V.-C., in *Re Hardy*, 17 C. D. 798, as the learned Vice-Chancellor himself recognizes in *Roper* v. *Roper*, 3 C. D. 714, 720. See also *Re Schweder's Estate*, [1891] 3 Ch. 44, *ante*, p. 1096, note (*d*). See, for further examples of preference of general legatees in payment, in consequence of the intention of the testator, not expressed in terms, but sufficiently apparent from the whole contents of the Will, *Lewin* v. *Lewin*, 2 Ves. Sen. 415; *Beeston* v. *Booth*, 4 Madd. 161, 170; *Pepper* v. *Bloomfield*, 3 Dr. & W. 499; *Haynes* v. *Haynes*, 3 De G. M. & G. 590; *Gyett* v. *Williams*, 2 Johns. & H. 429.

(*r*) *Miller* v. *Huddlestone*, 3 Mac. & G. 523, by Lord Truro.

be deemed to have considered that his estate would be sufficient to answer the purposes to which he has devoted it, and consequently not to have thought it necessary to provide against a deficiency, by giving a priority, in case of a deficiency, to some of the objects of his bounty. Therefore where the expressions are ambiguous, and do not mark with certainty the testator's intention, no priority can be allowed: Thus it is not sufficient that the testator gives a direction as to a general legacy to his wife, that it shall be paid *immediately* after his death, out of the *first* money that shall be received by the executors (*s*). So if the words are "*Imprimis*," or "in the first place, I give 1,000*l.* to A.," this will not give a priority to other general legatees (*t*). In the case of *Beeston* v. *Booth* (*u*), the testator gave his personal estate to executors, in the first place, to pay debts, funeral and testamentary expenses; and in the next place, three legacies to B., C., and D., with legal interest from three months after his death; and afterwards to raise and set apart three sums of money to be applied as therein mentioned: Upon a question of abatement, the Court declared, upon the principle before stated, that none of the legacies were entitled to a priority of payment, and, therefore, that all of them must abate proportionally, according to the general rule (*x*).

Legacies in the nature of specific legacies.

It is necessary here to refer to the class of legacies alluded to in a previous section (*y*), as being in the nature of specific legacies, and sometimes called demonstrative legacies, viz., bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself: those legatees have such a lien upon the specific fund referred

(*s*) *Blower* v. *Morret*, 2 Ves. Sen. 420; *Re Schweder's Estate*, [1891] 3 Ch. 44, in which Chitty, J., dissented from the decision of Malins, V.-C., in *Re Hardy*, 17 C. D. 798, on the ground that the Vice-Chancellor was bound by the decision of Lord Chancellor Hardwicke in *Blower* v. *Morret*, which decision, until it came before the Vice-Chancellor, had never been questioned by anyone.

(*t*) *Brown* v. *Allen*, 1 Vern. 31.

(*u*) 4 Madd. 161.

(*x*) See also *Thwaites* v. *Foreman*, 1 Coll. 409; *Creed* v. *Creed*, 1 Dr. & W. 416; 11 Cl. & F. 491; *Ashburnham* v. *Ashburnham*, 16 Sim. 186; *Miller* v. *Huddlestone*, 17 Sim. 71; 3 Mac. & G. 513; *Lord Dunboyne* v. *Brander*, 18 Beav. 313; *Eavestaff* v. *Austin*, 19 Beav. 591; *Haynes* v. *Haynes*, 3 De G. M. & G. 591; *Coore* v. *Todd*, 23 Beav. 92; 7 De G. M. & G. 520; *Wright* v. *Weston*, 26 Beav. 429; *Haslewood* v. *Green*, 28 Beav. 1; *Elwes* v. *Causton*, 30 Beav. 554.

(*y*) *Ante*, p. 913.

to that they will not be obliged to abate with general legatees: And in this, as in the preceding cases, the testator's intention is the principle: for it is inferred, that he, in referring to specific parts of his estate for payment of particular legacies, intended those legacies as a preference to others which he had not so secured (*z*).

Of the abatement of specific legacies.

It has appeared, that as long as any of the assets, not specifically bequeathed, remain, such as are specifically bequeathed are not to be applied in payment of debts (*a*); although to the complete disappointment of the general legacies: But when the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies (*b*). So a legatee entitled to a legacy of the sort just mentioned, in the nature of a specific legacy, must abate with the specific legatees (*c*).

An important inquiry, connected with this subject, sometimes occurs; viz., under what circumstances the specific legatees of chattels can compel the devisees of the real estate of the testator to contribute to the satisfaction of his debts, in case the general personal estate proves insufficient for that purpose. But it will be more convenient to consider this question hereafter, together with the subject of the exoneration of real estate (*d*) and the doctrine of marshalling assets (*e*).

(*z*) *Roberts* v. *Pocock*, 4 Ves. 150; *Lambert* v. *Lambert*, 11 Ves. 607; *Robinson* v. *Geldard*, 3 M. & G. 735, 745, *per* Lord Truro; *Acton* v. *Acton*, 1 Meriv. 178; *Creed* v. *Creed*, 11 Cl. & F. 491, 509, *per* Lord Cottenham; *Tempest* v. *Tempest*, 2 K. & J. 635; affd. 26 L. J. Ch. 501.

(*a*) Or of costs, when a suit has been instituted: *Barton* v. *Cooke*, 5 Ves. 464. But see *Newbegin* v. *Bell*, 23 Beav. 386.

(*b*) *Sleech* v. *Thorington*, 2 Ves. Sen. 561, 564; *Clifton* v. *Burt*, 1 P. Wms. 680; *Duke of Devon* v. *Atkins*, 2 P. Wms. 382, 383; 2 Fonbl. Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5, note (*q*). See *Fielding* v. *Preston*, 1 De G. & J. 438.

(*c*) *Roberts* v. *Pocock*, 4 Ves. 160.

(*d*) *Post*, Pt. IV. Bk. I. Ch. II. § I. p. 1315 *et seq.*

(*e*) *Ibid.* § II. p. 1337.

SECTION III.

Of the Executor's Assent to a Legacy.

Necessity of executor's assent to complete the title of legatee.

The whole personal property of the testator, as has appeared in a former part of this Work, devolves upon his executor (*f*). It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator having by his Will directed that a portion of it shall be applied to other purposes (*g*). Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect (*h*).

Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his Will, expressly direct that he shall do so: for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors (*i*).

Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered (*k*).

Legacy of forgiveness of debt.

Again, if the testator by Will forgive a debt due to him from a particular person, it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention; for although on the one hand, it may be alleged that the party, to whom the debt is bequeathed, must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation, and therefore that it needs no such assent, as where there is to be a transfer of the property: yet, on the other hand, a debt so forgiven is regarded, with great reason, in the light of a legacy, and, like other legacies, not to be sanctioned by the executor, in case the

(*f*) *Ante*, p. 485.

(*g*) *Ante*, p. 1078.

(*h*) Swinb. Pt. 1, § 6, pl. 5, s. 7, pl. 1; 1 Saund. 427, note (5) to *Duppa* v. *Mayo*.

(*i*) Wentw. Off. Ex. 409, 14th edit.

(*k*) Wentw. Off. Ex. 69, 14th edit.

estate be insufficient for the payment of debts: But as soon as the executor assents, and not before, it shall be effectually discharged (*l*).

Until modern times, it appears to have been the practice of the Bank of England, with respect to government stock or annuities, grounded upon the statute 5 W. & M. c. 20, by which the Bank was instituted, and upon the other Acts of Parliament which regulate the devise of property transferable at the Bank (by which the probates of Wills are directed to be there deposited, for the purpose of having the trusts extracted), in cases where stock, &c. has been specifically bequeathed, without the intervention of trustees, to permit the transfer to be made to the legatees, and not to the executor; and when trustees have been appointed, then to the trustees, with a restriction not to allow of a transfer to any other persons, except those named in the Will: It seems, however, to be now clear, that this practice is erroneous, and that the executor, having the legal right to the specific as well as to the general assets, to pay debts, &c., has the sole right to call upon the Bank to transfer the stock into his name: as no interest in it vests in the legatees prior to his assent (*m*). It also appears to be immaterial whether such property be given specifically in the strict sense of the word, or as residue; since such property is to be considered for this purpose as on the same footing as the other general assets, and therefore subject to all the incidents of a testamentary disposition of personal estate (*n*). And now, by stat. 33 & 34 Vict. c. 71, s. 23, it is expressly enacted, that all stock, standing in the name of any deceased person, shall and may be assigned and transferred by the executors or administrators of the deceased, notwithstanding any specific bequest thereof (*o*).

(*l*) Wentw. Off. Ex. 72, 14th edit. A debt so forgiven is, like a legacy, liable to legacy duty: *Att.-Gen.* v. *Holbrook*, 12 Price, 407; it may be adeemed: *Rider* v. *Wager*, 2 P. Wms. 332; it will lapse by the death of the debtor in the lifetime of the testator: *Toplis* v. *Baker*, 2 Cox, 118; *Elliott* v. *Davenport*, 1 P. Wms. 83; *Maitland* v. *Adair*, 3 Ves. 231; *Izon* v. *Butler*, 2 Price, 34; unless an intention "specifically penned" is shown to release the debt whether the debtor survives or not: *Sibthorp* v. *Moxon*, 3 Atk. 579; *South* v. *Williams*, 12 Sim. 566.

(*m*) See *ante*, pp. 625, 626. *Humberstone* v. *Chase*, 2 Younge & C. 209.

(*n*) 1 Rop. Leg. 732, 3rd edit.

(*o*) See *ante*, p. 626.

It follows from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him: So although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it (*p*).

If an executor refuse his assent without cause, he may be compelled to give it, by a Court of Equity (*q*).

Land Transfer Act, 1897: assent to a devise of real estate.

With regard to the real estate, which under sect. 1 (1) of the Land Transfer Act, 1897, vests in the personal representative, by sect. 2 (1) of that Act the persons by law beneficially entitled thereto have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate; and by sub-sect. (2) all enactments and rules of law as respects matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them (as in the Act mentioned), and sect. 3 (1) provides that "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance" (*r*).

Sect. 3 (2) of the Land Transfer Act, 1897, provides that "At any time after the expiration of one year from the death of

(*p*) *Mead* v. *Orrery*, 3 Atk. 239; Wentw. Off. Ex. 409, 14th edit.; Com. Dig. Admon. (C. 5); Bac. Abr. Exors. (L.) 3.

(*q*) Com. Dig. Admon. (C. 8).

(*r*) For the provisions of this Act, see Pt. IV. Bk. I. p. 1275 *et seq.*

the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

What shall constitute an assent.

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; and it may be either express or implied (*s*): The executor may not only in direct terms authorize the legatee to take possession of his legacy, but his concurrence may be inferred either from direct expressions or particular acts; and such constructive permission will be equally available (*t*). Thus, for instance, if a horse is bequeathed, and the executor requests the legatee to dispose of it; or if a third person proposes to purchase the horse of the executor, and he directs him to buy it of the legatee; or if the executor himself purchases the horse of the legatee, or merely offers him money for it, this amounts to an assent by implication to the legacy (*u*). So where the legatee of a term of years grants it to the executor, his acceptance of the grant, either for himself or as trustee, is an implied permission that the term shall be the legatee's to grant (*x*). So in a case where the rents or interest of a bequest are directed to be applied for the maintenance of the legatee during minority, if the executor commences so to apply them, his consent to the principal will be presumed (*y*). So where a term of years, subject to a quit rent, was devised, and after the testator's death his administrator with the Will annexed paid the quit rent for six years, and in an account rendered to the devisee,

(*s*) Whether there has been an assent or not may involve matters of law, but it is generally a question of fact: *Elliott* v. *Elliott*, 9 M. & W. 27, *per* Lord Abinger; *Mason* v. *Farnell*, 12 M. & W. 674. The form of assent prescribed in Forms 51 or 52 in the First Schedule to the Land Transfer Rules, 1903 (see Rule 185), must be produced to authorize the registrar to register the person named in the assent as proprietor of the land under sect. 3 (4) of the Land Transfer Act, 1897.

(*t*) Com. Dig. Admon. (C. 6); Toller, 308, 309.

(*u*) Wentw. Off. Ex. 414, 14th edit.; Com. Dig. Admon. (C. 6); Toller, 309.

(*x*) Wentw. Off. Ex. 414, 14th edit.; Com. Dig. Admon. (C. 6).

(*y*) *Paramour* v. *Yardley*, Plowd. 539.

debited him with the payments so made; Tindal, C. J., held that this was sufficient to show the assent of the administrator to the bequest (*z*): The mere fact, however, that an executor has made general payments to or for the benefit of a legatee of leaseholds and other property—not specifically out of or on account of the rents—is not, in the absence of representations on the subject by the executor to the legatee, sufficient to enable the Court to infer that the legacy has been assented to (*a*). So also if the legacy be subject to a charge, which is paid by the executor: the assent to the charge is assent to the disposition of the fund out of which it is to be satisfied (*b*).

Again, when the executor informs a legatee that he intends him to have the legacy according to the devise (*c*), or that the legacy is ready for him whenever he will call for it (*d*); such declarations clearly amount to a good assent to the bequest.

On the other hand, since the assent to a legacy by an executor may, in its consequences, be of great prejudice to him, it is but reasonable that the act or expressions deemed sufficient to impart that assent should be unambiguous (*e*). Hence a proposition stated in a book of authority (*f*) may be doubted; viz., that if the executor say to a legatee "God send you joy of your legacy," those expressions will amount to an assent: For if such words were uttered before the executor had had an opportunity of examining the testator's affairs, it would surely be unjust to construe words of congratulation into terms of assent to a legacy, so as to involve the executor in the consequences of a *devastavit;* although it may be otherwise, if those expressions were uttered after the executor had had sufficient time to acquaint himself with the state of the assets (*g*).

If a term of years or other chattel be bequeathed to A. for life, with remainder to B., and the executor assents to the interest of A., such interest will enure to vest that of B.; and *e converso;* for the particular estate and the remainder constitute but one estate (*h*). So an assent to a bequest of a lease for

(*z*) *Doe* v. *Mabberley*, 6 C. & P. 126.

(*a*) *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

(*b*) *Young* v. *Holmes*, 1 Stra. 70.

(*c*) Touchst. 456; *Barnard* v. *Pumfrett*, 5 M. & Cr. 70, *per* Lord Cottenham.

(*d*) *Hawkes* v. *Saunders*, Cowp. 293; *Barnard* v. *Pumfrett*, 5 M. & Cr. 70.

(*e*) See *Doe* v. *Harris*, 16 M. & W. 517.

(*f*) Shep. Touchst. 456.

(*g*) 1 Rop. Leg. 736, 3rd edit.

(*h*) *Stevenson* v. *Mayor of Liver*

years is an assent to a condition or contingency annexed to it (*i*): As if there be a devise of a term to the testator's widow so long as she continue unmarried; and if she marry, then of a rent payable out of the land; the executor's assent to the devise of the term is an assent to that of the rent in case of the devisee's marriage (*k*). So an assent to a devise of a chattel lease is an assent to a devise of rent out of it (*l*). But if a lessee for years bequeaths a rent to A. and the land to B., it has been doubted whether the executor's assent that A. shall have the rent is an assent that B. shall have the land (*m*). However, it is said to be now established, that in this case also, an assent to the bequest to one shall enure to the benefit of the other; on the ground that as the assent of the executor is required as well for the benefit of creditors as for his own, an inference arises, from his assent to one of the legatees of the specific property, that he had no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro ratâ* (*n*).

Presumed assent.

In certain cases, the assent of the executor may be presumed; upon the principle, that, in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid, but before the legacies are satisfied (*o*). So, as it would seem, the assent of an executor may be concluded from the legatee's possessing himself of the subject bequeathed, and retaining it for some considerable time without complaint by the executor (*p*).

Conditional assent.

The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands; or in the case of a devise of a term for years, provided the devisee will pay the rent in arrear at the testator's death; and

pool, L. R. 10 Q. B. 81. But where there is a bequest of a number of articles, as stock-in-trade or plate, the executor may properly withhold his assent as to part: *Elliott* v. *Elliott*, 9 M. & W. 23.

(*i*) Com. Dig. Admon. (C. 6).

(*k*) *Goffe* v. *Haywood*, 1 Roll. Abr. 620, tit. Devise (E.) pl. 2.

(*l*) Com. Dig. Admon. (C. 6); 1 Roll. Abr. 620, tit. Devise (E.) pl. 3.

(*m*) *Gough* v. *Howarde*, 3 Bulst. 122.

(*n*) 1 Rop. Leg. 738, 3rd edit.

(*o*) See *Cray* v. *Willis*, 2 P. Wms. 531, 532.

(*p*) Mathews on Presumptions, 267; 3 Preston, Abstr. 145, 2nd edit.; *Cole* v. *Miles*, 10 Hare, 179. This appears to be a question for the jury: *Richardson* v. *Gifford*, 1 Adol. & Ell. 52.

in that case, if the condition be not performed, there is no assent (*q*). But it would seem that if the condition is such as the executor had no authority to impose, for example, if he should declare his assent, provided the legatee went to York, and there did a thing for the executor's personal benefit, the assent would be considered absolute (*r*). So if the assent be on a condition subsequent, as, provided the legatee will pay the executor a certain sum annually, such condition is void, and a failure in performing it shall not devest the legatee of his legacy (*s*).

By whom the assent can be given.

It must now be inquired by whom the assent to a legacy may be given. It has appeared in an earlier part of this Work, that a person appointed executor may assent to a legacy before he proves the Will (*t*), and that even if he should die without taking probate, his assent would be effectual (*u*). Again, there has already been occasion to observe that if several executors be appointed, the assent of any one of them is sufficient (*x*); and therefore if there be a legacy to one of several executors, he may take it of his own assent, without the others (*y*). Further, the efficacy of an assent by an administrator *durante minore ætate*, in case of an infant being constituted executor (*z*), has been elsewhere previously considered in this Treatise.

Effect of assent.

At law, after an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee (*a*), so that he may bring ejectment (*b*), or trover (*c*), to recover it, even against the executor himself. And there has already been occasion to show (*d*), that an executor who has assented unconditionally to a specific bequest of the testator's leaseholds, is not entitled, in a Court of Equity, to require an indemnity out of the testator's general estate in respect of his covenants contained in the leases.

(*q*) Wentw. Off. Ex. 429, 14th edit.

(*r*) *Elliott* v. *Elliott*, 9 M. & W. 28, *per* Parke, B.

(*s*) Wentw. Off. Ex. 429, 14th edit.

(*t*) *Ante*, p. 220.

(*u*) *Ibid.*

(*x*) *Ante*, p. 718.

(*y*) 1 Roll. Abr. 618; Devise (B.) pl. 2; Perk. s. 572; Com. Dig. Admon. (C. 8); *Townson* v. *Tickell*, 3 B. & A. 31, 40.

(*z*) *Ante*, p. 393.

(*a*) *Ante*, p. 701, note (*h*); *Doe* v. *Guy*, 3 East, 120. See, as to leaseholds, *Re Culverhouse*, [1896] 2 Ch. 251.

(*b*) *Doe* v. *Guy*, *supra*.

(*c*) *Williams* v. *Lee*, 3 Atk. 223.

(*d*) *Ante*, p. 1081; *Shadbolt* v. *Woodfall*, 2 Coll. 30.

If there be a specific bequest to the executor himself in trust, and he assents to it, the thing bequeathed thereupon ceases to be a part of the testator's assets, and the executor becomes a trustee of it for those who are beneficially interested (*e*).

In what cases the assent may be retracted.

It is likewise true, as a general proposition, that if an executor once assent to a legacy, he can never afterwards retract (*f*); and notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy, and has a lien on the assets for that specific part, and may follow them (*g*). But if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a *bonâ fide* purchaser from the legatee on the faith of such assent, it seems only reasonable, that the executor under particular circumstances, should have the power of retracting it; as where he assents upon a reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed, which occasion a deficiency (*h*). Moreover, if the assent has been completed by payment or possession, and *afterwards debts appear*, of which the executor had no previous notice, he may compel the legatee to refund (*i*).

Relation of assent to death of testator.

The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the undertenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests (*k*). So such assent shall by relation confirm an intermediate grant by the legatee of his legacy (*l*).

(*e*) *Dix* v. *Burford*, 19 Beav. 409.

(*f*) Wentw. Off. Ex. 415, 14th edit.; Com. Dig. Admon. (C. 8). The author of "The Office of an Executor" expresses his opinion that an assent cannot be *after a disassent*, but thinks the question doubtful: p. 415 *et seq.*, 14th edit. So, if executors have set apart and appropriated assets to meet a legacy, and have admitted to the legatee that such appropriation has been made, they cannot retain or impound any part of such appropriated assets to meet a debt from the legatee to the general estate of the testator: *Ballard* v. *Marsden*, 14 C. D. 374.

(*g*) *Mead* v. *Orrery*, 3 Atk. 238; Toller, 311.

(*h*) See 1 Rop. Leg. 743, 3rd edit.

(*i*) See *post*, p. 1188; *Doe* v. *Guy*, 3 East, 123; *ante*, p. 701, note (*h*).

(*k*) Wentw. Off. Ex. 445, 446, 14th edit.; *Saunders' Case*, 5 Co. 12, *b*.

(*l*) Toller, 311. This is put

Executor's assent to his own legacy:

In a case of a legacy bequeathed to the executor, the union of the two characters of executor and legatee in one person makes no difference; for his assent is as necessary to a legacy vesting in him in the capacity of legatee, as to a legacy vesting in any other person (*m*): and that on the same principle, viz., that until he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts (*n*).

His assent to his own legacy may, as well as his assent to that of another legatee, be either express or implied: He may not only, in positive terms, announce his election to take it as a bequest, but such election may also be implied from his language or his conduct (*o*). The rule as to the latter, as laid down by Gibbs, C. J., *Doe* v. *Sturges* (*p*), is that "if an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy."

Therefore, if the executor say that he will have the legacy according to the Will (*q*); or if by deed reciting that he has a term for years by devise, he grant it over (*r*); this will amount to an assent to take it as legatee. So if he take the profits of a term to his own use (*s*), or repair the tenement bequeathed at his own expense (*t*), or if he exclude a co-executor from a joint-occupancy of a term with him (*u*), all these acts indicate an assent to the bequest. So if a term of years be devised to the executor for life, and afterwards to A. B., if the executor say that A. B. will have it after him, that implies an election to take it as legatee (*x*). In like manner, if he perform a condition or trust annexed to the devise; as if a lessee for years devise his

doubtingly in Wentw. Off. Ex. 69, 445, 14th edit.; and see the remark of Gibbs, C. J., at the conclusion of his judgment in *Doe* v. *Sturges*, 7 Taunt. 223.

(*m*) Toller, 345.

(*n*) Wentw. Off. Ex. 67, 68, 14th edit.; Toller, 345.

(*o*) Toller, 345; *Fenton* v. *Clegg*, 9 Exch. 680.

(*p*) 7 Taunt. 223.

(*q*) Com. Dig. Admon. (C. 6); *Garrett* v. *Lister*, 1 Lev. 25.

(*r*) Com. Dig. Admon. (C. 6). So if he dispose of it by his own Will: *Fenton* v. *Clegg*, 9 Exch. 680.

(*s*) Com. Dig. Admon. (C. 6).

(*t*) Com. Dig. Admon. (C. 6); *Cheyney* v. *Smith*, 1 Leon. 216.

(*u*) *Anon.*, Dyer, 277, *b*; Com. Dig. Admon. (C. 6).

(*x*) *Garrett* v. *Lister*, 1 Lev. 25; Com. Dig. (C. 6).

term to his executor, on condition of his paying 10*l.* a year to J. S., which he pays accordingly; this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing, claims the benefit which is annexed to it (*y*). Again, an assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character (*z*). On the other hand, if the executor merely say, that the testator "left all to him" (*a*), this will not amount to an election to take as legatee. Further, if the executor demise a term bequeathed to him by the description of executor, this cannot be construed into an assent, because the act is consistent with his power and character as executor (*b*): And even a lease by him in his own name, if the lease be in its terms inconsistent with his title as legatee, will not amount to an assent to take as legatee (*c*): It is a rule, that it is not sufficient, to constitute an implied assent, to show that the act is equally applicable to the title of legatee as to the character of executor (*d*).

Until the executor has made his election, either express or implied, he shall take the legacy as executor, though all the debts have been paid independently of such bequest (*e*).

Effect of executor's entry into possession of a term bequeathed to him.

With regard to the effect of *entry* by the executor into possession of a term of years bequeathed to him the following distinction exists: Where the *entire* term is given to the executor, an entry will amount to an election to take as legatee: But where a sole executor, or one of several executors, takes an interest in a leasehold estate for life, or any *partial* interest, he must do something more than enter, in order to give assent to his legacy (*f*). There is a substantial reason for this distinction; for if his general entry on his life estate were an election

(*y*) *Paramour* v. *Yardley*, Plowd. 544; Com. Dig. Admon. (C. 6).

(*z*) *Hinson* v. *Button*, 2 Roll. Rep. 158.

(*a*) 1 Roll. Abr. 620, Devise, (D.) pl. 6; Com. Dig. Admon. (C. 7).

(*b*) *Cheyney* v. *Smith*, 1 Leon. 316; Com. Dig. Admon. (C. 7).

(*c*) *Doe* v. *Sturges*, 7 Taunt. 222.

(*d*) *Ibid.* 217. See also *Trail* v. *Bull*, 1 Coll. 360, *per* K. Bruce, V.-C., accord.

(*e*) Com. Dig. Admon. (C. 5); cf. *Re Venn and Furze's Contract*, [1894] 2 Ch. 101. But see *Re Verrell's Contract*, [1903] 1 Ch. 65.

(*f*) *Doe* v. *Sturges*, 7 Taunt. 217, 221; *S. P.*, *per* Parke, J., *Doe* v. *Tatchell*, 3 B. & Adol. 680. See Touchs. 457, *contra*.

to enter as legatee, it would necessarily confirm the remainder devised over (*g*): and that might happen in cases wherein he might want the estate in remainder for sale, in order to pay the testator's debts: Such an assent would be a *devastavit* in the executor, which might be a grievous hardship to him: But if the devise to him be absolute, the same reason does not exist; for he has the value of the whole term, as an equivalent, to indemnify himself against the consequences of the *devastavit* (*h*).

In *Doe* v. *Sturges* (*i*), the law on this subject was fully considered by the Court of Common Pleas: In that case the testator bequeathed a term of years to his nephew Samuel Haynes for life, with remainder over, appointing Samuel and two other persons trustees and executors, with power for Samuel during life, and afterwards for the surviving executors and trustees, to demise the lands for twenty-one years: Samuel alone entered upon the property at the testator's death, and demised it for fourteen and forty-two years, reserving the rent to himself, his executors, &c.: He also made the contract for this lease in his own name, and disposed of the estate by his Will, one of his co-executors being alive: The estate was claimed by the plaintiff, deriving title under the Will of the first testator, in opposition to the interest of the defendant, a purchaser from the lessee: The lease could not be supported under the power, and, as a demise by a mere tenant for life, it determined upon his death; but as a lease by one of several executors, it might be supported, unless the executor Samuel had previously assented to the devise himself: In that event, the legal interest in the term in remainder after his death vested in the devisees over, which entitled them to recover; since the demise by the executor, in the character of a legatee, could only continue during his life: But the Court decided, that neither his entering into the land, nor his sole lease reserving rent to himself and his executors (which was alike inconsistent with his interest as tenant for life, and his duty as executor), should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor.

(*g*) See *ante*, p. 1105.

(*h*) *Doe* v. *Sturges*, 7 Taunt. 217, 221, by Gibbs, C. J., 514.

(*i*) 7 Taunt. 217.

In the case of the *Att.-Gen.* v. *Potter* (*k*), a testator bequeathed a leasehold house, and his residuary estate, to his wife, and John Lane and James Potter, whom he appointed his executrix and executors, in trust to permit his said wife to receive the rents, interests and profits for life, and afterwards to pay certain legacies, and the residue was given to Ann, the wife of the said James Potter, and three others, or such of them as should be living at his death: The widow, with the permission of her co-executors, retained possession of the house during her life, and Ann Potter, together with the three others, executed a deed, whereby they agreed to take as tenants in common; and it was also executed by James Potter the executor, and husband of Ann; And it was held by Lord Langdale, M. R., that no assent to the legacy of the house in remainder had been constituted by these facts.

However, an entry by an executor, to whom a partial interest only in a term of years had been bequeathed, may, accompanied by other circumstances, amount to an election to take as legatee: As where an executor, devisee for life of a term of years, enters upon the lands, explaining the act by a declaration that he claims the estate as devisee for life (*l*). So where a lease is devised to an executor, during the minority of the testator's eldest son, to the intent that with the profits he should educate all the children, and the residue of term, after the son attains twenty-one, is given to him; the entry of the executor generally, coupled with an application by him of the rent in educating the children, will amount to an assent, not only to the devise to himself, but of the residue of the term to the eldest son (*m*). In *Doe* v. *Tatchell* (*n*), a testator bequeathed a term in premises to R. Sharp, his executors, &c., in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of the testator's son during his life: He bequeathed the remainder after the son's decease to such uses as the son should by his Will appoint; and he appointed Sharp his executor: When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided

(*k*) 5 Beav. 164.

(*l*) *Welcden* v. *Elkington*, Dyer, 358, *b*, 359.

(*m*) *Paramour* v. *Yardley*, Plowd. 539. See also *Young* v. *Holmes*, 1 Stra. 710.

(*n*) 3 B. & Adol. 675.

there: At the funeral, Sharp said, in presence of the journeyman and other persons, "The house is young Batten's (meaning the son's), Tatchell (the journeyman) must stay in the house and go on with the business, but young Batten must have a biding place:" Tatchell accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son who was weak in intellect and unable to provide for himself: Sharp lived twenty years afterwards, and did not interfere further with the property: And the Court of King's Bench held, that that was a sufficient evidence of a disposal of the property by Sharp according to the trusts in the Will, and that he had assented to take under the Will as legatee in trust, and not as executor (*o*).

This decision, it may be observed, demonstrates that it is not essential for the efficacy or validity of an assent to a bequest that it should confer a legal interest, or affect the mere legal title to the subject of the bequest: And accordingly, in *Trail* v. *Bull* (*p*), where a testator bequeathed all his personal estate to his wife, with the exception of two leasehold houses, the rents of which he gave her for life, and after her death he directed that they should be sold and the produce divided among his four children, and he appointed his wife and another person his executrix and executor: and upon his death his wife entered into possession of his personal property, including the leasehold houses, and paid all his debts; it was held by Knight Bruce, V.-C., that, under the circumstances of the case, she had assented to the legacy to the children.

Executor taking possession of chattels bequeathed to him for life.

In *Richards* v. *Brown* (*q*), a testator bequeathed to a Miss Wade, whom he appointed executrix, his household furniture for her life, and after her death to Sarah Chapple: The testator, at the time of his decease, which took place in the year 1825, was indebted in 100*l.* on a promissory note, which he had made in the year 1816, and on which he had regularly paid interest during his life: On his death, Miss Wade took possession of the furniture, and continued to pay interest on the note up to the year 1831: On her death, in the year 1832, Sarah Chapple took possession of the furniture: And it was contended that Miss Wade, by so taking possession under the bequest to her for life,

(*o*) See also *Fenton* v. *Clegg*, 9 Exch. 680.

(*p*) 1 Coll. 352, affd. 22 L. J. Ch. 1082.

(*q*) 3 Bingh. N. S. 493, *ante*, p. 1082.

had assented to the residuary bequest of S. Chapple: But the Court of Common Pleas held, that this did not, under the circumstances, amount to such an assent: And Tindal, C. J., said, that though an assent to a particular estate in the property bequeathed is an assent to the estate in remainder also, yet, as Miss Wade might have taken the furniture either as executrix or as legatee, and as there was no reason for presuming that she took it on the bad title of a legatee while debts remained unpaid, when she might have taken it on a good one as executrix, it must be intended that she held it as executrix.

Executor's assent to his own legacy after renouncing.

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual; and if he take the thing bequeathed without the permission of the administrator *cum testamento annexo*, he will incur the same liabilities as any other legatee so acting (*r*).

Assent of one of several executors to his own legacy.

If one of several executors be a legatee, his single assent to his own legacy will vest the complete title in him (*s*): And if the subject be entire and given to all the executors, the assent of any one of them to his own proportion will be sufficient (*t*).

SECTION IV.

At what time Legacies are to be paid: and herewith of Bequests for Life, with remainder over.

Legacies generally payable at the end of a year from testator's death.

On the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. The period fixed by the civil law for that purpose, which our Courts have also prescribed, and which is analogous to the Statute of Distributions (as will hereafter be seen), is a year from the testator's death, during which it is presumed that the executor may fully inform himself of the state of the property (*u*). But within that period he cannot be

(*r*) *Broker* v. *Charter*, Cro. Eliz. 92. And by reason of Stat. 20 & 21 Vict. c. 77, s. 79 (*ante*, p. 205), the law is now the same, where the legatee, being one of several executors, renounces, and the others prove the Will.

(*s*) 1 Roll. Abr. 618, Devise (B.), pl. 2, 3; *Townson* v. *Tickell*, 3 B. & A. 31, 40; *ante*, pp. 718, 1107.

(*t*) *Ibid.*

(*u*) *Wood* v. *Penoyre*, 13 Ves. 333, 334; *Pearson* v. *Pearson*, 1 Scho. & Lefr. 11; Toller, 312.

compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death (*x*).

This allowance, however, to executors is merely for convenience, in order that the debts of the testator may be ascertained, and the executors made acquainted with the amount of assets, so as to be able to make a proper distribution of them (*y*). Therefore, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so (*z*).

Again where a legacy was given to A. to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator; it was holden that B. was entitled to receive the legacy immediately upon the death of A.: for although it was objected, that this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held that the year's time must be intended to be from the death of the testator; whereas in this case the testator had been dead much longer (*a*).

Practice in an administration action.

According to the ordinary practice in an action to administer the assets of a deceased testator, the Court in the first place waits until all the claims on the estate are settled, and until the clear fund is ascertained; and then the particular legatees are paid (*b*): They are paid their principal, and if entitled to

(*x*) See *Benson* v. *Maude*, 6 Madd. 15. In *Brooke* v. *Lewis*, 6 Madd. 358, the testator gave certain legacies, which he directed to be paid within six months after his decease; and he directed the residue to be divided among certain persons named, or such of them as should be living *at the time the same should be distributed:* And it was holden that the residue was to be divided among the legatees named, who were living at the end of one year after the death of the testator.

(*y*) *Garthshore* v. *Chalie*, 10 Ves. 13.

(*z*) *Pearson* v. *Pearson*, 1 Scho. & Lefr. 12, by Lord Redesdale. "I know of no case," said Lord Eldon, in *Angerstein* v. *Martin*, 1 Turn. & R. 241, "which prevents executors, if they choose, from paying legacies, or handing over the residue, within the year: and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." His Lordship also observed, on another occasion, that if a case was produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months: *Garthshore* v. *Chalie*, 10 Ves. 13.

(*a*) *Laundy* v. *Williams*, 2 P. Wms. 478.

(*b*) *Thomas* v. *Montgomery*, 1 Russ. & M. 737.

interest, they are paid interest at the rate of four per cent. up to that time (*c*).

But if it clearly appears, that a surplus will remain, after discharging all the testator's debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the Court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors (*d*).

In a case (*e*) where it appeared, upon affidavits, that the estate was large, with but few debts or charges thereon, the Court ordered the jointure of the widow of the testator and annuities given by his Will, to be paid out of the income of the estate, *before decree*, but refused to direct the payment of the pecuniary legacies.

Legacy subject to a divesting contingency.

Where a legacy is given generally, subject to a limitation over upon a subsequent event, the devesting contingency will not prevent the legatee from receiving his legacy at the end of the year from the testator's death; and he is not bound to give security for repayment of the money, in case the event should happen: Thus where a legacy was given on condition to be void in case the legatee should succeed to an estate in the event of the death of A. without issue of her body, payment was decreed in the lifetime of A., and without security for refunding (*f*). But where a legacy was given to a father, on condition that he did not interfere with the education of his daughter; on a bill by the father, for his legacy, the Court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy (*g*).

Annuity.

If an annuity be given by Will, it shall commence immediately from the testator's death, and consequently the first payment shall be made at the expiration of a year next after that event (*h*). Where an annuity is expressly directed to commence

(*c*) See R. S. C. 1883, Ord. LV. r. 64; *Re Gardner*, 67 L. T. 552; *Re Campbell*, [1893] 3 Ch. 468; *Re Inman*, *ibid.* 518; *Re Snaith*, 71 L. T. 318.

(*d*) *Thomas* v. *Montgomery*, 1 Russ. & M. 729. But the legatees are not entitled to have the fund appropriated, subject to the eventual demands established: see R. S. C. 1883, Ord. L. r. 9.

(*e*) *Digby* v. *Boycatt*, 4 Hare, 444.

(*f*) *Fawkes* v. *Gray*, 18 Ves. 131. See also *Griffiths* v. *Smith*, 1 Ves. 97; 1 Rop. Leg. 752, 3rd edit.

(*g*) *Colston* v. *Morris*, 6 Madd. 89.

(*h*) By Lord Eldon, in *Gibson* v.

within the year, as at the first quarter-day after the testator's death (*i*), or where an annuity is given with a direction that it shall be paid monthly (*k*), the money will be due at the first quarter-day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor, till the end of the year. Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator; and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of the year (*l*). Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death; the annuity does not commence till fifteen months from the death of the testator (*m*).

Bequests for life, remainder over:

A distinction was taken by Lord Eldon, in *Gibson* v. *Bott* (*n*), between an annuity and a legacy for life: "If an annuity," said his Lordship, "is given, the first payment is made at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest" (*o*).

However, a different doctrine prevails with respect to a bequest of the *residue* of personal estate for life, with remainder

Bott, 7 Ves. 96, 97, and in *Fearns* v. *Young*, 9 Ves. 553; *Stamper* v. *Pickering*, 9 Sim. 176. See also *Houghton* v. *Franklin*, 1 Sim. & Stu. 392, where Sir J. Leach observes that, as a Will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expressions in the Will to control that intention. But in *Storer* v. *Prestage*, 3 Madd. 168, his Honour said that "when annuities *are given out of a residue*, and there is no time of payment mentioned in the Will, it may be questioned whether the principle must not be the same as if there were one tenant for life of the residue, and the annuities be payable only from the end of one year after the testator's death."

(*i*) *Storer* v. *Prestage*, 3 Madd. 167.

(*k*) *Houghton* v. *Franklin*, 1 Sim. & Stu. 390.

(*l*) *Irvin* v. *Ironmonger*, 2 Russ. & M. 531.

(*m*) *Ibid.*

(*n*) 7 Ves. 89, 96.

(*o*) It is a doubtful point whether a sum of money, directed to be placed out to produce an annuity, is to be considered as a legacy payable at the end of a year, or as an annuity, payable from the death: *ibid.* 97.

over. The later decisions have established that the person taking the residue for life is entitled to the income, in some shape or other, from the death of the testator (*p*). The executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts, legacies, and other charges such portion of the fund as, together with the income of that portion for one year, was necessary for the payment thereof (*q*). And when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year, attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest (*r*).

Some difficulty, however, exists in applying this doctrine in instances where the testator has directed the residue to be invested in specified securities.

Rule in *Dimes* v. *Scott*: direction to convert:

The principle in *Dimes* v. *Scott* (*s*), it is now established, is that applicable (*t*). There the testator directed the residue of his personal estate to be converted into money, and invested in government or real securities in trust for A. for life, and after his death for B.: Part of the estate consisted of a share which

(*p*) *Angerstein* v. *Martin*, 1 Turn. & R. 232; *Hewitt* v. *Morris*, 1 Turn. & R. 241; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Dimes* v. *Scott*, 4 Russ. 195; *Douglas* v. *Congreve*, 1 Keen, 410; *Taylor* v. *Clarke*, 1 Hare, 161; *Macpherson* v. *Macpherson*, 1 Macq. H. of L. 243. But see *contrà*, *Taylor* v. *Hibbert*, 1 Jac. & Walk. 308; *Stott* v. *Hollingworth*, 3 Madd. 161; *Griffith* v. *Morrison*, 1 Jac. & Walk. 311, note; and *Amphlett* v. *Parke*, 1 Sim. 275.

(*q*) *Allhusen* v. *Whittel*, L. R. 4 Eq. 295; *Lambert* v. *Lambert*, L. R. 16 Eq. 320.

(*r*) *Wrightwick* v. *Lord*, 6 H. L. C. 226; see Pt. III. Bk. III. Ch. V. § I. p. 1192. This rule was applied to real estate in *Marshall* v. *Crowther*, 2 C. D. 199; following *Barnes* v. *Bond*, 32 Beav. 653, and disapproving *Greisley* v. *Earl of Chesterfield*, 13 Beav. 288.

(*s*) 4 Russ. 195.

(*t*) In *Morgan* v. *Morgan*, 14 Beav. 72, 92, Romilly, M. R., not only considered himself bound to follow the decision in *Dimes* v. *Scott*, and adopted accordingly the principle there laid down, but added that it seemed to him to be that which was least open to objection. See accord. *Re Llewellyn's Trusts*, 29 Beav. 171; *Yates* v. *Yates*, 28 Beav. 637; *Holgate* v. *Jennings*, 24 Beav. 623; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Porter* v. *Baddeley*, 5 C. D. 542. See also *Macpherson* v. *Macpherson*, 1 Macq. H. of L. 243. With regard to the controversy which formerly existed, see *La Terriere* v. *Bulmer*, 2 Sim. 18; *Douglas* v. *Congreve*, 1 Keen, 410; *Taylor* v. *Clarke*, 1 Hare, 161; and *Morgan* v. *Morgan*, *ubi supra*, referred to in earlier Editions of this Work.

the testator had in an Indian loan bearing interest at ten per cent.: After it had been determined that a conversion ought to have been made into three per cent. stock at the end of a year after the testator's death, a question arose, whether the tenant for life was entitled to the interest actually made during the year: and it was held by Lord Lyndhurst, that the tenant for life should be allowed during that period, in lieu of the actual income, the dividends on so much three per cent. stock as the proceeds of the property, if converted at the end of that year, would have purchased.

The rule in *Dimes* v. *Scott* applies where securities ought to be converted, and in such case the tenant for life will be entitled to the dividends upon so much three per cent. stock as the proceeds would have purchased at the end of the year.

When property is given by Will on trusts for conversion and investment, and to hold the investments on trust for a tenant for life and remaindermen, with a discretionary power to the trustees to postpone the conversion, and a provision that the income until conversion is to go to the tenant for life, that provision extends to property (such as a reversionary interest) which is not producing income as well as to property of a wasting character (*u*).

rule not applicable where there is a prohibition against conversion:

The rule does not apply where there is a prohibition against conversion (*x*), for in such case, as in the case where the testator has authorised retention of the fund in specified securities other than those which a Court of Equity would approve, the tenant for life is entitled during the continuance of the investment to the specific income (*y*).

rule applicable although there is a power to delay conversion.

Where there is no prohibition against conversion but merely a power to delay conversion, and in the meantime to maintain the investment or user as it was at the testator's death, the property must be valued as of the time of the testator's death, and the tenant for life will have three per cent. on such value as falling within the third division pointed out by Parker, V.-C., in *Meyer* v. *Simonsen* (*z*), which divisions are the following:—First, where

(*u*) *Re Rowlls*, [1900] 2 Ch. 107; following *Mackie* v. *Mackie* (1845), 5 Hare, 70.

(*x*) *Green* v. *Britten*, 1 De G. J. & S. 649.

(*y*) *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312, 337.

(*z*) 5 De G. & S. 723. See also *Re Chaytor*, W. N. (1904), p. 195. The principle of the cases of *Meyer* v. *Simonsen*, *post*, p. 1123, note (*m*), and *Brown* v. *Gellatly*, *ubi supra*, was, in *Wentworth* v. *Wentworth*,

the subject-matter of the bequest is either invested in the funds or in some security of which the Court approves, mere conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the *corpus* belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainderman; such a case is one of partial conversion and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take the interest and the remainderman the *corpus*. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate (*a*). There the rule is not to convert the property but to set a value upon it, and to give the tenant for life three, formerly four, per cent. on such value, and the residue of the income must then be invested and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainderman (*b*).

Time when the value of a reversionary interest should be calculated.

In calculating the value of a reversionary interest of property within the third division, although generally the value is to be taken as at the end of one year from the testator's death according to tables of life average, yet if the reversion has fallen in before valuation, the estimate must be on the assumption that the reversion would fall in when it actually did (*c*).

[1900] A. C. 163, applied by the House of Lords to rents and royalties from mining leases, but their lordships did not think that it would be expedient to hamper the Court by laying down any fixed rule as to the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property; they therefore held that the tenants for life were entitled to receive out of the rents and royalties such an annual sum as, in the opinion of the Court, would, under all the circumstances of the case, be a fair equivalent for the annual income that would have resulted if the estate had been converted. In *Re Woods*, [1904] 2 Ch. 4, a similar case of mining royalties, Kekewich, J., allowed 3½ per cent. per annum on the estimated value, and the income of the investments from time to time made of the surplus royalties.

(*a*) As in *Gibson* v. *Bott*, 7 Ves. 89; *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312; and *Re Llewellyn's Trust*, 29 Beav. 171.

(*b*) In adjusting the rights as between tenant for life and remaindermen in respect of a reversionary interest, which ought to have been, but was not, converted by trustees, interest should be calculated at 3 per cent.: *Re Rowlls*, [1900] 2 Ch. 107; following *Re Goodenough*, [1895] 2 Ch. 537.

(*c*) *Wright* v. *Lambert*, 6 C. D.

With regard to contingent legacies, the tenant for life is entitled to the intermediate income of the fund set apart to meet them. That fund is residue until it is wanted (*d*).

Intermediate income of contingent legacies forms part of residue.

It is, however, obvious, that the language of a Will may be such as to entitle the tenant for life to receive the actual income of the testator's property *in specie*, as it stood at his death, and nothing more or less until the property shall be actually converted, or at all events, until it might have been so, but for improper delay (*e*).

Where by a Will or settlement property is directed to be sold and converted and the proceeds held in trust for one for life and then for others, and the sale is without impropriety postponed, the person entitled to the life interest in the proceeds of sale is as regards real estate entitled to the rents and profits until sale (*f*).

Where sale of real estate is, without impropriety, postponed, tenant for life is entitled to rents and profits until sale.

Again, the claim of the tenant for life to any income at all during the year may, of course, be controlled by an opposite disposition of the income before investment. Thus, where a residue is directed to be laid out in land, to be settled on a person for life, with remainder over, and *the interest to accumulate* until the money is so laid out, the accumulation shall cease at the end of the year from the testator's death, and from that period the legatee for life will be entitled to the interest (*g*).

In *Vickers* v. *Scott* (*h*), where a testator directed a sale of his real estate with all convenient speed after his death, and that

649; following *Wilkinson* v. *Duncan*, 23 Beav. 469.

(*d*) *Allhusen* v. *Whittell*, L. R. 4 Eq. 295. Cf. *Re Whitehead*, [1894] 1 Ch. 678.

(*e*) See *Wrey* v. *Smith*, 14 Sim. 202; *Mackie* v. *Mackie*, 5 Hare, 70; *Sparling* v. *Parker*, 9 Beav. 524.

(*f*) *Yates* v. *Yates*, 28 Beav. 637; *Re Searle*, [1900] 2 Ch. 829. In this case, Kekewich, J., said (p. 834), "I do not base my judgment upon the language of this particular Will, but on the general principle that, where there is a trust for sale with a power to postpone which has been exercised, or where the sale without any impropriety has been postponed, the rents and profits of the real estate, until sale, are payable to the person who would be entitled to the income of the proceeds of sale."

(*g*) *Sitwell* v. *Bernard*, 6 Ves. 520; *Stair* v. *Macgill*, 1 Bligh, N. S. 662; *Vigor* v. *Harwood*, 12 Sim. 172; *Tucker* v. *Boswell*, 5 Beav. 607; *Macpherson* v. *Macpherson*, 1 Macq. H. of L. 249. See also *Parry* v. *Warrington*, 6 Madd. 155; *Greisley* v. *Lord Chesterfield*, 13 Beav. 288, as to which case see, however, *Marshall* v. *Crowther*, 2 C. D. 199. As to the allocation of profits to interest and capital under a partnership deed, and the effect on the interest of a tenant for life, see *Straker* v. *Wilson*, L. R. 6 Ch. 503.

(*h*) 3 M. & K. 500.

the produce, together with his residuary personal estate, should be invested, and the dividends be paid to one for life, and further directed that the trustee should stand possessed of the trust moneys and rents and profits until sale and investment; and the land remained unsold; Sir J. Leach, M. R., said that the tenant for life, by the clear language of the Will, was not entitled to the rents and profits of the residuary real estate until it had been sold and the produce invested: That it was consistent with principle and authority, that twelve months should be considered as the time within which the sale might reasonably have been made: And that from that time the tenant for life was entitled to the rents of the estate.

Rule in *Howe* v. *Lord Dartmouth*: no direction to convert, but property of a character not recognised by the Court as proper to be continued:

With respect to cases where the testator simply bequeaths all the residue of his personal estate for life with remainder over, without any direction to invest it in any particular manner, it must be observed, that, as between the tenant for life and the remainderman, where the residue consists in part, or wholly, of property in its nature perishable, and daily wearing out, such as leaseholds (not specifically given), the tenant for life will not be entitled to the annual produce which the property so wearing out is actually making, but to interest from the death on the estimated value (*i*). And it is a general rule (usually called the rule in *Howe* v. *Lord Dartmouth*), that where personal property is bequeathed for life, with remainder over, and not specifically, it is to be converted into the three per cents., subject, in the case of a real security, to an inquiry, whether it will be for the benefit of all parties: and the tenant for life is entitled only upon that principle (*k*). And it appears to be now established

(*i*) *Gibson* v. *Bott*, 7 Ves. 89; *Fearns* v. *Young*, 9 Ves. 552; 2 Rop. Leg. 298, 3rd edit. The general rule being that, where property is invested on a security of a wasting character, that must be realised, or, if it is not realised immediately, then the tenant for life is only entitled to interest on the realised value, unless the testator otherwise directs, the tenant for life will not get the profits until conversion, merely because the trustees exercise a discretionary power given to them to postpone conversion: *Brown* v. *Gellatly*, L. R. 2 Ch. 751, 757. But when a testator has himself expressly directed what shall be done with the income accruing during the period of postponement, the general rule does not apply: *Re Chancellor*, 26 C. D. 42. And see *Re Crowther*, [1895] 2 Ch. 56, as to profits of business pending sale.

(*k*) *Howe* v. *Lord Dartmouth*, 7 Ves. 137, *a*; *ante*, p. 926. See also *Wrightwick* v. *Lord*, 6 H. L. C. 217, 228. Railway shares, unless within the range of in-

with respect to the application of this rule, that the tenant for life is to be allowed, *as from the death of the testator*, the income of such parts of the personal estate as were at his death, and have remained, in a state of investment which ought to be recognised and allowed to be continued by a Court of Equity (*l*). But that with regard to those parts of the personal estate which neither were at the testator's death, nor have since been, in such a state of investment as ought to be recognised and allowed to be continued by the Court, they must be valued as at a period of one year after his death; and interest at the rate of three per cent. per annum from his death, on the value so taken, must be paid to the tenant for life (*m*).——But though, for the

vestments authorised by statute or by the Will, must be converted: *Thornton* v. *Ellis*, 15 Beav. 193. But this general rule does not apply to property of a testator who makes his Will and dies in India, leaving property and a family there, unless the parties come to this country; and then the person entitled in remainder can have the fund brought here and invested: *Holland* v. *Hughes*, 16 Ves. 111. Dividends in a public company earned before the testator's death, but declared afterwards, form income, and not *corpus*: *Bates* v. *Mackinley*, 31 Beav. 280. See also *McLaren* v. *Stainton*, De G. F. & J. 202; reversing *S. C.*, 27 Beav. 460; *Gilly* v. *Burley*, 22 Beav. 618; *Lock* v. *Venables*, 27 Beav. 598. Where trustees, without authority, lent trust money at interest at 5*l.* per cent., it was held that the tenant for life was entitled to the whole interest, and that the remainderman had no right to insist that the excess of the interest beyond the dividend, which would have been produced if the money had been invested in consols, formed capital: *Stroud* v. *Gwyer*, 28 Beav. 130. See also *Ibbotson* v. *Elam*, L. R. 1 Eq. 188; *Re Bird*, [1901] 1 Ch. 916. Cf. however, *Re Hill*, 54 L. J. Ch. 551; 45 L. T. (N. S.) 126.

(*l*) It should be noted that, though the general rule in *Howe* v. *Lord Dartmouth* remains in full effect, yet it is no longer absolutely necessary to invest either in the three per cents. or on real security, for, since the decision of that case, various statutes have enlarged the class of securities in which an executor or trustee may invest. See *post*, p. 1449.

(*m*) *Caldecott* v. *Caldecott*, 1 Y. & Coll. Ch. C. 312, 737. See also *Turner* v. *Newport*, 2 Phil. Ch. C. 14; 14 Sim. 32; *Cox* v. *Cox*, L. R. 8 Eq. 343; *Wilkinson* v. *Duncan*, 23 Beav. 469; *Wright* v. *Lambert*, 6 C. D. 649; *Re Chesterfield's Trusts*, 24 C. D. 643; *Beavan* v. *Beavan*, 24 C. D. 649, note; *Re Hengler*, [1893] 1 Ch. 586. As to rate of interest, see *Re Goodenough*, [1895] 2 Ch. 537; *Re Rowlls*, [1900] 2 Ch. 107; *Re Woods*, [1904] 2 Ch. 4, *ante*, p. 1119, note (*z*). In *Meyer* v. *Simonsen*, 5 De G. & Sm. 723, a testator gave the residue of his real and personal estate to trustees, upon trust to pay to his widow, or permit her to receive, the income and profits, and after her death he gave the capital over. The Will contained no direction as to the

purpose of determining the amount of income to which the tenant for life is entitled, the property must be thus feigned to be in a proper state of investment at that period, it does not follow that he can demand payment of income to that amount, until the property in respect of which it is payable shall be got in (*n*).

conversion of his estate. Part of it consisted of 12,000*l.*, invested in a partnership. Under a stipulation in the deed of partnership, the surviving partner gave a warrant of attorney to the executors of the testator, securing payment of that sum by instalments of 1,500*l.* a year, with interest at 5 per cent. on the unpaid balances. And it was held by Parker, V.-C., that the rule in *Howe* v. *Lord Dartmouth*, as applied to this case, required the trustees not to convert the property, but to set a value on it, and to give the tenant for life 4*l.* per cent. on the value, and to invest the residue of the surplus income, paying the income of these investments to the tenant for life, and appropriating the *corpus* to the remainderman. See accord. *Re Llewellyn's Trust*, 29 Beav. 171; and further *ante*, p. 1119, note (*z*).

(*n*) *Taylor* v. *Clarke*, 1 Hare, 161, 170.

This principle is applied where there is a deficiency in the assets. Thus, where an obligor covenanted to pay, three months after his death, a fund to trustees, upon trust for a tenant for life and remainderman, with interest from the date of his death until payment, and, several years after the obligor's death, assets were recovered which were insufficient to fulfil the covenant and bond, it was held that a calculation must be made of what principal would, at 4 per cent. interest from the obligor's death, amount to the sum recovered, and the difference between such principal and the sum recovered paid to the tenant for life: *Cox* v. *Cox*, L. R. 8 Eq. 343. The true principle in all these cases is that neither the tenant for life nor the remainderman is to gain an advantage over the other, and that neither is to suffer more damage in proportion to his estate and interest than the other suffers. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession. Where a fund is settled upon tenant for life and remaindermen, and is invested in accordance with the powers of the settlement upon a mortgage, which proves to be insufficient for the payment of principal and interest in full, the sum realised by the security ought to be apportioned between the tenant for life and the remaindermen, in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt: *Re Atkinson*, [1904] 2 Ch. 160; following *Re Moore*, 54 L. J. Ch. 432, and *Re Alston*, [1901] 2 Ch. 584, and overruling *Re Foster*, 45 C. D. 629, and *Re Phillimore*, [1903] 1 Ch. 942. Where the partial loss arises from an unauthorised investment, the tenant for life is entitled to such a proportion of the amount realised by the unauthorised investment, plus the income he received there-

The rule in *Howe* v. *Lord Dartmouth* amounts to this, that where there is a residuary bequest of personal estate (*o*) to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into

from during its continuance, as the dividends he would have received from the authorised investment in the same period bear to the capital value of the authorised investment plus those dividends, the tenant for life being liable to bring into account all income he received from the unauthorised investment, although not liable to refund: *Re Bird*, [1901] 1 Ch. 916; *Re Grabowski's Settlement*, L. R. 6 Eq. 12, is distinguishable because there the intention was to settle a specific fund and not the debt, whatever it might amount to. In making the valuation in cases where the tenant for life dies before the assets are recovered, the valuation must be made according to the fact and not according to the tables of life average. See *Wright* v. *Lambert*, 6 C. D. 649, following *Wilkinson* v. *Duncan*, 23 Beav. 469, which was not altered by *Brown* v. *Gellatly*, L. R. 2 Ch. 751.

The principle applies where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainder over, and such residue includes outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postpone for the benefit of the estate, and which eventually falls in some years after the testator's death, as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy. Such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum, which put out at interest at three per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate, with yearly rests and deducting income tax, would, with the accumulation of interest, have produced at the day of receipt the amount actually received, and the sum so ascertained should be treated as capital and the residue as income: *Re Chesterfield's Trusts*, 24 C. D. 643, following *Beavan* v. *Beavan*, *ibid.* 649, note; *Re Hobson*, 55 L. J. Ch. 422; *Re Flower*, 62 L. T. 217; *Re Morley*, [1895] 2 Ch. 738. Where trustees having a discretionary power to postpone conversion never exercised their discretion as to the conversion of a reversionary interest which ought to have been sold, it was held that the fund must be apportioned on the principle of *Re Chesterfield's Trusts*, interest being calculated at the rate of three per cent. per annum: *Re Rowlls*, [1900] 2 Ch. 107.

(*o*) *Semble*, the rule applies only where there is a disposition by Will of residuary personal estate given as one fund to be enjoyed by several persons in succession: *Re Van Straubenzee*, [1901] 2 Ch. 779.

permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character, and are consequently deemed to be more or less hazardous (*p*). This presumed intention of the testator may of course be rebutted by the words of his Will. Accordingly, where the bequest to the tenant for life is *specific*, the legatee in remainder is not entitled to have the property so converted, notwithstanding that, by reason of its being a decreasing fund, the legacies over may altogether fail (*q*). So where the bequest is not *specific*, in the strict sense of the expression, yet if the Court find in the Will an indication of intention that the property is to be enjoyed in its existing state, that intention must be carried into effect, and the property will be so enjoyed (*r*). The Court will find such an intention much more

rule not applicable where bequest to tenant for life is specific;

nor where intention is indicated that the property should be enjoyed in its existing state.

(*p*) *Macdonald* v. *Irvine*, 8 C. D. 101, 112, *per* Baggallay, L. J.

(*q*) *Vincent* v. *Newcombe*, Younge, 599; *Lord* v. *Godfrey*, 4 Madd. 455; *Cockran* v. *Cockran*, 14 Sim. 248; *Bethune* v. *Kennedy*, 1 My. & Cr. 114. And see *ante*, p. 926. As to what constitutes a specific legacy, see *ante*, p. 911 *et seq.*

(*r*) *Ante*, p. 926; *Collins* v. *Collins*, 2 M. & K. 702; *Alcock* v. *Sloper*, 2 M. & K. 699; *Pickering* v. *Pickering*, 4 M. & Cr. 289; *Goodenough* v. *Tremamondo*, 2 Beav. 512; *Vaughan* v. *Buck*, 1 Phil. Ch. C. 75; *Harvey* v. *Harvey*, 5 Beav. 134; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Hinves* v. *Hinves*, 3 Hare, 609; *Cafe* v. *Bent*, 5 Hare, 24; *Hubbard* v. *Young*, 10 Beav. 203; *Hunt* v. *Scott*, 1 De G. & Sm. 219; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Neville* v. *Fortescue*, 16 Sim. 333; *Harris* v. *Poyner*, 1 Drew. 174; *Crowe* v. *Crisford*, 17 Beav. 507; *Marshall* v. *Bremner*, 2 Sm. & G. 237; *Vachell* v. *Roberts*, 32 Beav. 140; *Hind* v. *Selby*, 22 Beav. 373; *Wearing* v. *Wearing*, 23 Beav. 99; *Skirving* v. *Williams*, 24 Beav. 275; *Holgate* v. *Jennings*, 24 Beav. 623; *Boys* v. *Boys*, 28 Beav. 436; *Rowe* v. *Rowe*, 29 Beav. 276; *Green* v. *Britten*, 1 De G. J. & S. 649; *Wilday* v. *Sandys*, L. R. 7 Eq. 455; *Re Sewell's Estate*, L. R. 11 Eq. 80; *Thursby* v. *Thursby*, L. R. 19 Eq. 395; *Gray* v. *Siggers*, 15 C. D. 74; *Re Chancellor*, 26 C. D. 42; *Re Sheldon*, 39 C. D. 50. For cases where the Court has *not* been able to find such intention, see *Lichfield* v. *Baker*, 13 Beav. 447 (see also 2 Beav. 481); *Benn* v. *Dixon*, 10 Sim. 636; *Caldecott* v. *Caldecott*, 1 Y & C. C. C. 312; *Sutherland* v. *Cooke*, 1 Coll. 498; *Johnson* v. *Johnson*, 2 Coll. 441; *Chambers* v. *Chambers*, 15 Sim. 183; *Morgan* v. *Morgan*, 14 Beav. 27; *Thornton* v. *Ellis*, 15 Beav. 193; *Blann* v. *Bell*, 2 De G. M. & G. 775; *Murton* v. *Markby*, 18 Beav. 126; *Hood* v. *Clapham*, 19 Beav. 90; *Jebb* v. *Tugwell*, 20 Beav. 84; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Tickner* v. *Old*, L. R. 18 Eq. 422; *Porter* v. *Baddeley*, 5 C. D. 542; *Macdonald* v. *Irvine*, 8 C. D. 101; *Re Game*, [1897] 1 Ch. 881.

easily where the gift is an absolute one followed by an executory limitation (*s*).

Effect of a statutory sale of leaseholds enjoyed *in specie*.

If leaseholds which a tenant for life is entitled to enjoy *in specie* are taken compulsorily under the Lands Clauses Consolidation Act or sold under the Settled Estates Act, the purchase-money should be invested in an annuity having as many years to run as the original lease, and the proceeds paid to the person entitled to the proceeds of the leaseholds (*t*). Where in such a case the purchase-money was invested in consols it was held that after the death of the tenant for life her estate was entitled to the difference between the dividends received by her and the aggregate amount of the rental which would have been received during her life (*u*). And where, under similar circumstances, the tenant for life outlives the term he will be entitled to the whole fund (*x*).

Inventory by legatee for life.

If personal chattels are bequeathed to A. for life, remainder to B., A. will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder (*y*). The old practice of the Court of Chancery was to require the tenant for life to give security for the protection of the remainderman: But such security is not now required, unless a case of danger is shown (*z*).

Gift for life of things *quæ ipso usu consumuntur*.

It may here be observed, that a gift for life of things *quæ ipso usu consumuntur*, as corn and wine, *if specific*, is an absolute gift of the property; but if *residuary*, the things must be sold and the interest of the produce paid to the legatee for life (*a*).

(*s*) *Re Bland*, [1899] 2 Ch. 336.

(*t*) *Askew* v. *Woodhead*, 14 C. D. 27, 34, *per* Jessel, M. R.

(*u*) *Jeffreys* v. *Connor*, 28 Beav. 328.

(*x*) *Re Beaufoy's Estate*, 1 Sm. & Giff. 20; *Phillips* v. *Sargent*, 7 Ha. 33. See also Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 34, as to sales under that Act. As to the mutual rights of tenants for life and remaindermen in respect of renewable leases and the duties of trustees with regard to them, see Lewin on Trusts, Chap. xv.; White & Tudor's Leading Cases in Equity, 7th edit., Vol. II., p. 693, Notes on *Keech* v. *Sandford*.

(*y*) *Slanning* v. *Style*, 3 P. Wms. 336; *Leeke* v. *Bennett*, 1 Atk. 471; *Bill* v. *Kinaston*, 2 Atk. 82.

(*z*) *Foley* v. *Burnell*, 1 Bro. C. C. 279; *Conduitt* v. *Soane*, 1 Coll. 285.

(*a*) *Randall* v. *Russell*, 3 Meriv. 194; *Andrew* v. *Andrew*, 1 Coll. 690. See *Porter* v. *Tournay*, 3 Ves. 314. According to the old rule of the common law, a bequest of a term of years, or of a personal

Farming stock and implements of husbandry are not things *quæ ipso usu consumuntur* within this rule (*b*). Where a wine merchant, possessed of a large stock of wine, by his Will gave everything he died possessed of to his wife for life, it was held that she took absolutely the wine which the testator had for his private use, but a life interest only in that kept for the purpose of trade (*c*).

Legacy to an infant.

Where the legatee is an infant, the executor cannot safely pay him, or any other person on his account, until he attains twenty-one, unless under the provisions of the statute 36 Geo. III. c. 52, s. 32, which, however, was repealed by the Trustee Act, 1893, except as to Scotland (*d*). In certain cases, indeed, he may apply the *interest* of the legacy to the maintenance of the infant: This subject will be pursued hereafter, together with the inquiry as to the proper person to whom legacies are to be paid (*e*).

Payment when legatee dies under age.

If a legacy be given to A. to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until A., if living, would have attained twenty-one (*f*): But where interest is given during the minority, and the legatee dies under age, his executors or administrators will be entitled immediately on his death (*g*).

Again, in case a legacy be left to A. at twenty-one, and if he die before that period, then to B., and A. dies before he attains his age, B. shall be entitled immediately; for he does not claim under A., but the bequest is a distinct substantive

chattel, passed the whole property, and no remainder could be limited after it. But the objection was removed by changing the name from *remainders* to *executory bequests: Manning's Case*, 8 Co. 94, *b*; 95, *a*; 2 Saund. 338 *k*.

(*b*) *Groves* v. *Wright*, 2 K. & J. 347; *Myers* v. *Washbrook*, [1901] 1 Q. B. 360. But see *Breton* v. *Mockett*, 9 C. D. 95.

(*c*) *Phillips* v. *Beal*, 32 Beav. 25; *Cockayne* v. *Harrison*, L. R. 13 Eq. 432.

(*d*) See *post*, pp. 1139, 1140.

(*e*) *Post*, p. 1140 *et seq.*

(*f*) *Crickett* v. *Dolby*, 3 Ves. 13. And see *ante*, p. 971.

(*g*) *Cloberry* v. *Lampen*, 2 Freem. 25; *Crickett* v. *Dolby*, 3 Ves. 13. But if a legacy be payable out of *land* at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the Court will not direct the legacy to be raised until the time for payment arrives: *Gawler* v. *Standerwick*, 2 Cox, 15.

bequest, to take effect on the contingency of A. dying during his minority (*h*).

A legacy of a defined fund vested absolutely is payable at twenty-one, notwithstanding payment is further postponed by the Will.

It should here be remarked, that where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one, but by the terms of the Will payment is postponed to a subsequent period, *e.g.*, till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one; for at that age he has the power of charging or selling, or assigning it, and the Court will not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own (*i*). So, notwithstanding a legacy is directed to accumulate for a certain period, *e.g.*, until the legatee attains the age of thirty, yet if he has an absolute indefeasible interest in the legacy, he may require payment the moment he is competent, by reason of having attained twenty-one, to give a valid discharge (*k*).

(*h*) *Laundy* v. *Williams*, 2 P. Wms. 478. But where legacies were given to A., B., and C., the three co-heiresses of the testator, to be paid at their respective marriages, and if any of them should die, her legacy to go to the survivors; and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages: for the condition, though not repeated, was annexed to the whole, whether it accrued by survivorship, or by the original devise: *Moore* v. *Godfrey*, 2 Vern. 620. See also, as to a legacy charged on land, *Feltham* v. *Feltham*, 2 P. Wms. 271.

(*i*) *Curtis* v. *Lukin*, 5 Beav. 147, 155, 156; *Rocke* v. *Rocke*, 9 Beav. 66; *Re Young's Settlement*, 18 Beav. 199.

(*k*) *Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115; Cr. & Ph. 240; *Greet* v. *Greet*, 5 Beav. 123; *Re Colson's Trusts*, Kay, 133, 141; *Re Jacob's Will*, 29 Beav. 402; *Gosling* v. *Gosling*, Johns. 265; *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; *Holloway* v. *Webber*, L. R. 6 Eq. 523; *Re Wrey*, 30 C. D. 507; *Gott* v. *Nairne*, 3 C. D. 278; *Harbin* v. *Masterman*, [1894] 2 Ch. 184; *Wharton* v. *Masterman*, [1895] A. C. 186, where the legatee was a charity. The Thellusson Act (39 & 40 Geo. III. c. 98) provides (stated shortly) that no person by deed or Will, &c., shall settle or dispose of any real or personal property in such manner that the rents or produce shall be accumulated for a longer period than the life of the settlor or twenty-one years after his decease; or during the minority of any party living at his decease; or the minorities of persons beneficially entitled. Any other direction shall be void and the rents, &c., shall, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, go to and be received by such person or persons as would have been entitled thereto if such accu-

Laches by neglect to invest legacies directed to be laid out in stock.

Where, in the administration of an estate, a Court of Equity decrees the payment of legacies which by the Will are directed to be invested in stock, it is immaterial whether the executor might or might not have been able, with reasonable diligence, to provide for the legacies at an earlier period, in order to fix him with such amount of stock as at the earlier period might have been purchased with the legacy: And the reason, probably, is, that the difficulty and expense which would attend such an inquiry in the case of an executor, make it more convenient in practice that the legacy should be provided for in money at the time of the administration by the Court, without reference to the price of stocks: But where a legacy is given by a Will to a trustee, who is not an executor, and he is directed to invest it immediately upon receiving it in the purchase of stock, and he receives it from the executor, and instead of investing it keeps it in his own hands, his conduct is a plain breach of trust, and he is clearly answerable to his *cestui que trust* for any loss

mulation had not been directed. Sect. 2 excepts from the Act any provision for payment of debts, or for raising portions for children, or touching the produce of timber, and sect. 3 excepts dispositions of heritable property in Scotland. By the Accumulations Act, 1892 (55 & 56 Vict. c. 58), no person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated. Although the Will contains no express direction to accumulate, yet if an accumulation necessarily takes place by reason of the form in which the property is given, the case falls within the Act: *Tench* v. *Cheese*, 6 De G. M. & G. 453. The Thellusson Act cannot be applied so as to accelerate the enjoyment of any gift or disposition contained in a Will, nor for the purpose of giving to any term or description in a Will a meaning which it would not have had had the trust for accumulation been good: *Green* v. *Gascoyne*, 4 De G. J. & S. 565. As to income the accumulation of which is prevented by the Thellusson Act (39 & 40 Geo. III. c. 98), see *Weatherall* v. *Thornburgh*, 8 C. D. 261; *Re Parry*, 60 L. T. N. S. 489; and *Re Travis*, [1900] 2 Ch. 541. As to what is a "portion" within the meaning of sect. 2 of the same Act, see *Beech* v. *Lord St. Vincent*, 3 De G. & Sm. 678; and *Re Stephens*, [1904] 1 Ch. 322. A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within sect. 2 of the Thellusson Act: *Re Heathcote*, [1904] 1 Ch. 826.

by a subsequent rise in the price of stock: There is in such a case no difficulty or inconvenience in ascertaining the extent of the loss: And accordingly, when an executor, who happens also to be named a trustee of a legacy to be laid out in stock, has fully administered the estate, and assented to the legacy, and retains the legacy in his hands, not as assets of the testator, but as trustee of the legacy, then the principles which would apply to another trustee must apply to him: He is no longer clothed with the character of executor, but is, as to the legacy, a mere trustee (*l*).

Appropriation of legacies payable *in futuro.*

It is necessary, in conclusion, to advert to the subject of the payment of legacies which by the Will are made payable *in futuro.* Although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to go into the Court of Chancery, and pray that a sufficient sum be set apart to answer the legacy when it shall become due (*m*).

Thus, in *Ferrand* v. *Prentice* (*n*), a bill was filed by a legatee for the security of a legacy of 200*l.*, which the executor, the defendant, was directed by the Will to pay at the end of ten years after the death of the testator: The bill prayed that the defendant might admit assets and give security, or pay the money into the Bank: And, although no particular reasons were assigned, as wasting assets, or insolvency in the defendant, yet Sir Thomas Clark, M. R., decreed that the defendant should pay the money into the Bank, and that he should have the interest in the meantime; and that, at the end of the ten years, the principal should be paid to the plaintiff. So in *Walker* v. *Cook* (*o*), a legacy was left to one to be paid at the age of twenty-four: The legatee being only twelve years old, his father filed a bill that the legacy might be invested in the funds: And it was so decreed, though it was declared that the legatee was not entitled to the money before attaining the age of twenty-four. So in *Johnson* v. *Mills* (*p*) the sum of 2,000*l.* was left to

(*l*) *Byrchall* v. *Bradford*, 6 Madd. 13; *S. C.*, *ibid.* 235, 240. See as to when an executor is *functus officio* and becomes a trustee, *Re Timmis*, [1902] 1 Ch. 176.

(*m*) By Lord Hardwicke, in *Phipps* v. *Annesley*, 2 Atk. 58. It is otherwise where the legacy is to be raised out of real estate: *Gawler* v. *Standerwick*, 2 Cox, 15.

(*n*) Ambl. 273; *S. C.*, 2 Dick. 568; *S. C.*, cited by Lord Thurlow, 1 Bro. C. C. 105.

(*o*) Cited by Lord Thurlow in *Green* v. *Pigot*, 1 Bro. C. C. 105.

(*p*) 1 Ves. Sen. 282; *S. C.*, cited

the testator's daughter at twenty-one; and in default, to her child, and if no child, to one Mills: A bill was filed to secure the fund; which was opposed by the executrix, on the ground that there was no danger of insolvency in the case: But Lord Hardwicke said, "I thought nothing was better settled than what is now endeavoured to be made a question; that whenever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands: Nor is there any more useful part of the jurisdiction of this Court in the administration of assets: therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so that it might fall into the bulk of the estate: and this is done to secure the interest of every party, of course, as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets" (*q*).

Again, in *Green* v. *Pigot* (*r*), a legacy of 5,000*l.* was given to a female infant, to be paid at twenty-one or marriage, with interest at four per cent.; but if she died before, it was directed by the Will that the legacy should sink into the residue: And Lord Thurlow ordered the sum of 5,000*l.* (with interest at four per cent. from the end of a year after the testator's death) forthwith to be laid out in three per cents. in the name of the Accountant-General, upon the trust and subject to the contingencies in the testator's Will: And his Lordship said that he did not see any distinction as to the legacy being contingent or merely future (*s*). So in *Carey* v. *Askew* (*t*), the testator

by Lord Thurlow, *nomine Johnson* v. *De la Creuze*, 1 Bro. C. C. 105. The principle of this case is not, however, to be extended to cases of contingent legacies where the interest in the meantime does not go to the legatee: *per* Vaughan-Williams, L. J., in *Re Hall*, [1903] 2 Ch. 226, 232, *post*, p. 1133.

(*q*) But in *Re Braithwaite*, 21 C. D. 121, it was held that the rule that if personal property consisting of money or stock is limited to A. for life, and after his death to B. absolutely, it will be ordered into Court for administration in an action by B. for the purpose is not absolute, and will only be enforced as against A. where there is reasonable ground, such as danger to the fund, for the application.

(*r*) 1 Bro. C. C. 103.

(*s*) See *Pullen* v. *Smith*, 5 Ves. 21, for an instance of an appropriation on the application of a contingent legatee. See also the observation of Buller, J., in *Hutcheson* v. *Hammond*, 3 Bro. C. C. 144, 145.

(*t*) 2 Bro. C. C. 58.

gave 15,000*l.* to his daughter, to be paid to her at twenty-one or marriage, with interest in the meantime; but if she died before, to sink: And Lord Kenyon, M. R., held, that the money must be immediately raised and appropriated, although the child might not live to attain her age, or day of marriage (*u*).

However, it would appear from the case of *Webber* v. *Webber* (*x*), that where a legacy of a certain sum of money is given, on a contingency, the Court will not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but will direct the whole residue to be paid over to the residuary legatee, on his giving satisfactory security: The principle on which this was so ruled was, that the legatee being entitled to receive a certain sum in money when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock (*y*).

When the appropriation is made under the direction of the Court, it would seem, according to the opinion of Lord Thurlow, in *Green* v. *Pigot* (*z*), that the legatee must bear any losses and enjoy any additions which the fluctuation of the price of stock may cause: But in *Sitwell* v. *Bernard* (*a*), Lord Eldon said, that there had been other cases since *Green* v. *Pigot*, in which it had been held not to be the legitimate effect of appropriation to give a larger interest than if there had been no appropriation: However, in the subsequent case of *Burgess* v. *Robinson* (*b*), where there had been an investment of 500*l.* in stock, in pursuance of an order made on the application of a trustee, without the consent of the plaintiff, who was entitled thereto, Sir William Grant held that the investment of the money was an appropriation by which all parties were bound, and therefore that the plaintiff was entitled to the stock, and all the benefit accrued from the rise thereof (*c*).

Distinction between a contingent legacy,

In *Re Hall* (*d*), it was held by the Court of Appeal that when a cash legacy is given upon the happening of a con-

(*u*) See also *The Governesses Benevolent Institution* v. *Rushbridger*, 18 Beav. 467.

(*x*) 1 Sim. & Stu. 311.

(*y*) By Sir John Leach, V.-C., 1 Sim. & Stu. 312, 313; and see *King* v. *Malcott*, 9 Hare, 692; *Re Hall*, [1903] 2 Ch. 226.

(*z*) 1 Bro. C. C. 105, 106.

(*a*) 6 Ves. 543.

(*b*) 3 Meriv. 9, 10.

(*c*) See also *Rock* v. *Hardman*, 4 Madd. 254, by Sir John Leach, V.-C.; *Kimberley* v. *Tew*, 4 Dr. & W. 139, 149.

(*d*) [1903] 2 Ch. 226.

without interest in the meantime, and a legacy payable *in futuro*, as to appropriation.

tingency, *e.g.*, the attainment of twenty-one years of age by the legatee, but without interest in the meantime, the executor is not entitled to set apart and invest the amount and appropriate the investment to satisfy the legacy, so that in case, on the happening of the contingency, the investment has become depreciated in value, the legatee must bear the loss. In the course of his judgment, Vaughan-Williams, L. J., says, "I think there has been some little confusion in the argument between a legacy payable *in futuro* and a contingent legacy. If there is a vested legacy which will certainly be payable *in futuro*, I take it the legatee has an absolute right to go to the trustee or executor and say, 'Although my legacy is payable *in futuro* it is a vested legacy, and I require you to invest the amount of it'; and not only would the legatee have the right to require that, but he could insist upon its being done; and when it was done that would be an appropriation in the strict sense of the word, and the gain or loss upon the investment (as the case might be) would go to or fall upon the legatee. And that is what I understand Lord Hardwicke to have meant when he said in *Johnson* v. *Mills* (*e*), 'I thought nothing was better settled than what is now endeavoured to be made a question; that whenever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands.' That, however, has no application to a case in which not only is the legacy contingent, but the interest in the meantime, until the happening of the contingency, does not go to the legatee, but remains part of the testator's estate. In *Green* v. *Pigot* (*f*), Lord Thurlow treated the legacy as vested and defeasible if the legatee did not attain twenty-one or marry. But interest was given to her in the meantime, and there was accordingly no difficulty in the executor making an appropriation, because the legatee might at the time be treated as owner of the investment, she taking the interest in the meantime. In the present case, however, the contingent legatee does not take the interest in the meantime, and that interest is part of the testator's estate, and in these circumstances I have not heard any authority cited which leads to the conclusion that the executors had any right to do

(*e*) 1 Ves. Sen. 282. (*f*) 1 Bro. C. C. 103.

more than as prudent executors to retain as part of the estate a sufficient sum to answer the legacy, if it should become necessary to do so by reason of the happening of the contingency. The executors would have to deal reasonably with that part of the estate, and in fact would have to invest it as part of the estate generally and not as appropriated to any particular purpose. I need not say more. There is no authority for the proposition that the executors are entitled at their own will to take a part of the estate which they are holding to answer the contingent legacy as a *cestui que trust*. As to what might be done by an order of the Court or by arrangement I do not say, and I need not inquire. All I do say is that the executors under this Will had no authority to make the appropriation which they did make, and that the loss by depreciation in value of the stock cannot fall upon the legatee. She is entitled to receive 1,000*l.* in full without any deduction."

Appropriation to secure bequest of an annuity

When a testator bequeaths legacies and annuities, and then gives the residue of his property, after payment of his debts, funeral and testamentary expenses, legacies and annuities, the annuitants are not entitled as a matter of right to have the estate converted, and a sum sufficient to answer the annuity invested in such securities as the Court would approve for the investment of funds under its control; but they are entitled to have the annuities sufficiently secured, for instance, by a mortgage of real estate of the testator (*g*).

When a fund has been appropriated for the payment of an annuity given by Will, a question may arise whether the legatee is to suffer the loss consequent on the partial failure of the fund. In cases where the annuity is a charge upon the whole personal estate, it seems clear that the executor cannot affect the legatee's right to the entire annuity by any appropriation (*h*). Thus in *May* v. *Bennett* (*i*), a testator having directed his executors to lay out, in what government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified

(*g*) *Re Parry*, 42 C. D. 570; *Harbin* v. *Masterman*, [1896] 1 Ch. 351.

(*h*) *Gordon* v. *Bowden*, 6 Madd. 342.

(*i*) 1 Russ. Chan. Cas. 370. And this was adopted in the case of *Carmichael* v. *Gee*, 5 App. Cas. 588. Cf. *Harbin* v. *Masterman*, [1896] 1 Ch. 351.

income: Those dividends were afterwards diminished by the conversion of the 5 per cents. into 4 per cents.: And Lord Gifford, M. R., held, that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. Again in *Davies* v. *Wattier* (*k*), a testator having directed an annuity to be paid out of his personal estate, a sum of 5 per cent. stock was, in the course of the cause, ordered to be set apart to answer the annuity: This fund having become insufficient for the purpose, by the conversion of the 5 per cents. into 4 per cents., the deficiency was directed by Sir John Leach, V.-C., to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled (*l*). But it may be otherwise where the appropriation is made in certain stock by the executor in conformity with the direction of the testator, so that the bequest may be regarded as a gift of the interest of the particular stock. Thus in *Kendall* v. *Russell* (*m*), a testator gave the yearly sum of 2,000*l.* sterling to his wife for her life, and after her decease, to his trustees upon the same trusts as after declared concerning the yearly sum of 3,000*l.*: He then gave to his trustees the yearly sum of 3,000*l.* sterling to issue out of a sufficient sum of stock in the 5 per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for her life, and, after her decease, for her children: The trustees invested 100,000*l.* 5 per cents., to answer the two yearly sums: The stock was afterwards converted into 4 per cents., whereby the dividends became insufficient to pay the yearly sums: And Sir L. Shadwell, V.-C., held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate. Where, although the requisite amount of stock has been appropriated in the name of the executor, he afterwards sells it out and wrongfully applies the proceeds to his own use, he and all those who may stand in his

(*k*) 1 Sim. & Stu. 463.

(*l*) See also *Boyd* v. *Buckle*, 10 Sim. 595.

(*m*) 3 Sim. 424. See also *Bague* v. *Dumergue*, 10 Hare, 462; *Baker* v. *Baker*, 6 H. L. C. 616, 628; *Hickman* v. *Upsall*, 2 Giff. 124. If the legatee of the annuity assents to the appropriation of some particular fund for the payment of it, the failure thereof, whether partial or total, would probably be at his risk: Lumley on Annuities, p. 298. But such assent must be clearly established: see *Arundell* v. *Arundell*, 1 M. & K. 316.

place, including a claimant by assignment from him for valuable consideration, even when made before the *devastavit*, of his share in the testator's residuary estate, are precluded from contending that due provision was made for the annuity; and consequently the deficiency caused by the executor's *devastavit* must be supplied out of his share of the residue (*n*).

Appropriation where the amount of the testator's debts is contingent.

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings, before a foreign tribunal, which are not likely to be speedily settled, the Court, in administering his assets, will not be induced by that circumstance to direct an appropriation of the fund in Court to answer pecuniary legacies subject to such demands as creditors may eventually establish (*o*).

SECTION V.

To whom Legacies are to be paid.

This inquiry is one of great importance to an executor, who must be careful to pay legacies into the hands of those who have authority to receive them.

Legacy to A. and his family.

If a legacy be given to A., to be divided between himself and his family, and the executor pays the legacy to A., it is well paid to discharge the executor (*p*). So if one was to give a legacy to the senior Six Clerk, to be divided among himself and the other Six Clerks, it would be well paid to the senior (*q*).

Infant legatee.

It is a general rule, that, where a legatee is an infant, and would be entitled to receive the legacy, if he were of age, the executor is not justified in paying it either to the infant,

(*n*) *Morris* v. *Livie*, 1 Y. & C. Ch. C. 380; *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Doering* v. *Doering*, 42 C. D. 203. See also *post*, p. 1632. Inasmuch as real estate, since the Land Transfer Act, 1897, vests in the legal personal representative, there would seem to be no difference, so long as the real estate continues so vested, between a person deriving title under a residuary legatee and a person deriving title under a residuary devisee in this respect. Cf. *Fox* v. *Buckley*, 3 C. D. 508; *Re Brown*, 32 C. D. 597.

(*o*) *Thomas* v. *Montgomery*, 1 Russ. & M. 729, *ante*, p. 1116.

(*p*) *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186; *Robinson* v. *Tickell*, 8 Ves. 142. See the cases collected *ante*, p. 887.

(*q*) *Cooper* v. *Thornton*, 3 Bro. C. C. 99, by Lord Alvanley.

or to the father, or any other relation of the infant, on his account, without the sanction of a Court of Equity (*r*): And even in the case of a legatee who has attained majority, payment to the father is not good, unless it be made by the consent of the legatee, or confirmed by his subsequent ratification (*s*). It may happen that an executor has, with the most honest intentions, paid the legacy to the father of the infant; nevertheless he will be held liable to pay it over again to the legatee on his coming of age: And although such cases have been attended with many circumstances of hardship on the executor, yet he has been held responsible, on the policy of obviating a practice so dangerous to the interests of infants, and so naturally productive of domestic discord (*t*).

Confirmation by legatee after attaining majority

But if a Court of Equity can discover a clear act of the legatee, when of age, confirmatory of the application of his legacy by the executor during his minority, it will hold him

(*r*) *Dagley* v. *Tolferry*, 1 P. Wms. 285; *S. C., nomine Doyley* v. *Tollferry*, 1 Eq. Cas. Abr. 300, pl. 2; *S. C., nomine Dawley* v. *Ballfrey*, Gilb. Eq. Rep. 103. A contrary doctrine was acted upon in the early case of *Holloway* v. *Collins*, 1 Chan. Cas. 245; *S. C.*, 1 Eq. Cas. Abr. 303, pl. 1. In *Walsh* v. *Walsh*, 1 Drewr. 64, Kindersley, V.-C., under special circumstances, ordered an infant's legacy of small amount to be paid to the father. In *McCreighton* v. *McCreighton* (1849), 13 Ir. Eq. 314, the Lord Chancellor of Ireland held, with regard to the power of testamentary guardians appointed under the statute 14 & 15 Car. II. c. 19 (Ir.), analogous to the statute 12 Car. II. c. 24 (Eng.), that such a guardian was entitled, by force of the power and authority given by the statute, to give a discharge for the general personal estate of the infants; and consequently, where an infant was entitled to a vested legacy, payment thereof during his minority by the executor to the testamentary guardian was valid. In *Re Cresswell* (1881), 45 L. T. 468, Fry, J., held that a testamentary guardian is not entitled, as such, to obtain payment out of Court of funds, the property of the infant ward, which have been paid into Court under the Legacy Duty Act (36 Geo. III. c. 52), and his Lordship added: "I have no intention of interfering with the decision of Brady, L. J., in *McCreighton* v. *McCreighton* (*ubi supra*), who had not there to deal with the statute, the terms of which compel me to refuse the application." It would be unwise at the present day for an executor to incur risk in paying a legacy of an infant to his testamentary guardian.

(*s*) *Cooper* v. *Thornton*, 3 Bro. C. C. 97, by Lord Alvanley. If a suit was instituted in the Spiritual Court for an infant's legacy by the father, to have it paid into his hands, an injunction or prohibition would have been granted: *Rotherham* v. *Fanshaw*, 3 Atk. 629.

(*t*) Toller, 314; *Dagley* v. *Tolferry*, *ubi supra*.

estopped from claiming a repayment (*u*). Accordingly, Lord Alvanley observed (*x*), with reference to the case of *Dagley* v. *Tolferry* (*y*), "Although the son acquiesced a great length of time, still it was competent to him, or his representatives, to demand it; because a contrary determination would encourage such payment, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father: and that I take to be the ground on which Sir John Trevor and Lord Cowper went: *and if the legatee did not stand in that relation to the person to whom the legacy was paid*, the bill would be dismissed." But the intention, on the part of the legatee, to confirm such application must be unequivocal (*z*).

of previous application of legacy.

When the direction to the executor is not to pay the legacy to the child, but the bequest is made to a *trustee* for him, the executor will be justified in paying the money to the person so appointed (*a*). Hence, if the testator order the sum to be paid to the father, he will be a trustee for his child, and entitled to receive the money; and his receipt will be a good discharge to the executors (*b*). It seems clear, that the direction for payment to the trustee must appear upon the face of the Will, and cannot be proved by parol evidence (*c*).

Payment of bequest to a trustee for an infant.

But the executor may discharge himself from all responsibility, with respect to the payment of legacies due to infants, by virtue of the Trustee Act, 1893, which repealed sect. 32 of the statute 36 Geo. III. c. 52, under which provision was made for payment thereof, after deducting the duty chargeable thereon, into the Bank of England with the privity of the Accountant-General of the Court of Chancery (*d*), to be placed to the account of the person or persons for whose benefit the same should be so paid.

Trustee Act, 1893, s. 42.

(*u*) 1 Rop. Leg. 771, 3rd edit.

(*x*) 3 Bro. C. C. 97.

(*y*) *Ubi supra.*

(*z*) See *Lee* v. *Brown*, 4 Ves. 362.

(*a*) 1 Rop. Leg. 771, 3rd edit.

(*b*) *Cooper* v. *Thornton*, 3 Bro. C. C. 96; *Robinson* v. *Tickell*, 8 Ves. 142, *ante*, p. 1137.

(*c*) *Cooper* v. *Thornton*, 3 Bro. C. C. 97.

(*d*) By stat. 35 & 36 Vict. c. 44, the office of Accountant-General has been abolished, and his duties transferred to the Paymaster-General, whose duties with regard to the investment of money paid in under the above section, and to a grant of a certificate of the same, are now regulated by Rule 41 of the Supreme Court Funds Rules, 1894.

By sect. 42 of the Trustee Act, 1893, trustees or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court, and the same shall, subject to the Rules of Court, be dealt with according to the order of the High Court. Under sect. 50, the expressions "trust" and "trustee" include the duties incident to the office of personal representative of a deceased person (*e*).

Before the passing of 36 Geo. III. c. 52, if a suit was commenced to secure a legacy to an infant, the costs were allowed out of the testator's general assets: But after the statute was passed, Lord Alvanley took occasion to say (*f*), that in future he should not give the costs in such a case; for since the statute, the executor had nothing to do but under that Act to pay the legacy into Court; and then he had done: and the infant, when of age, might petition for it.

The executor was not bound to pay the legacy into the Bank, under the statute, till the expiration of a year from the testator's death (*g*).

When the executor may allow maintenance out of a legacy:

(a) out of capital:

It must also be observed that generally an executor cannot, without risk, pay any part of a legacy bequeathed to an infant, either to the infant or to any person for his use. Therefore the executor is not, as a rule, justified in applying any part of the capital of the legacy for the maintenance of the child (*h*), nor indeed of the interest except under the conditions hereinafter appearing. But the Court will in some cases, upon application being made for its sanction, authorise the application of part of the capital for maintenance, if either the total fund is small (*i*), or there is no other means of providing for the support of the child (*k*). And it appears that the executor may do the same on his own authority, if he does no more than the Court would have directed if it had been resorted to in the first instance (*l*). For the principle is established, that if an executor do, without

(*e*) See *post*, p. 1556.

(*f*) *Whopham* v. *Wingfield*, 4 Ves. 630. See *Wells* v. *Malbon*, 31 Beav. 48.

(*g*) Toller, 319.

(*h*) *Davies* v. *Austen*, 3 Bro. C. C. 178; 1 Ves. 247; *Carmichael* v. *Wilson*, 3 Moll. 79; *Robison* v. *Killey*, 30 Beav. 520. See also *post*, p. 1152.

(*i*) *Barlow* v. *Grant*, 1 Vern. 255; *Ex parte Green*, 1 Jac. & W. 253. Compare *Robison* v. *Killey*, *ubi supra*.

(*k*) *Harvey* v. *Harvey*, 2 P. Wms. 21; *Prince* v. *Hine*, 26 Beav. 634. Compare *Re England*, 1 R. & M. 499.

(*l*) Rop. Leg. 768, 3rd edit.

application, what the Court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application (*m*). At the same time it is the prudent course for an executor in every case to apply to the Court before devoting any part of the capital of a legacy to maintenance (*n*).

(b) out of income of fund; (1) by statute:

The power of applying the interest of a legacy to the maintenance of an infant legatee is now principally regulated by the Conveyancing and Law of Property Act, 1881 (*o*). This Act repealed sect. 26 of Lord Cranworth's Act (*p*), which dealt with the same matter in almost identical terms (*q*). By the Conveyancing and Law of Property Act, 1881 (sect. 43), it is provided as follows:—

(1.) Where any property is held by trustees in trust for an infant (*r*), either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

(*m*) *Lee* v. *Brown*, 4 Ves. 362, 369, *per* Lord Alvanley; *Prince* v. *Hine*, 26 Beav. 634.

(*n*) For the manner of application, see *post*, p. 1153.

(*o*) 44 & 45 Vict. c. 41, s. 43.

(*p*) 23 & 24 Vict. c. 145, s. 26.

(*q*) This section provided: "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently, they may at their sole discretion pay to his guardians, or otherwise apply for his maintenance or education, the whole or any part of the income of the property; and they shall accumulate the residue of such income by way of compound interest, for the benefit of the person who shall ultimately be entitled to the property, unless it appears to them expedient to apply such accumulations as if the same were part of the income arising in the then current year." By sect. 34, these provisions only applied to instruments executed after August 28, 1860. The principal differences between sect. 26 of this Act and sect. 43 of the Conveyancing and Law of Property Act, 1881, are pointed out in *Re Dickson*, 28 C. D. 291; 29 C. D. 331 (C. A.).

(*r*) Where a residue is bequeathed to an infant and the residue has been ascertained, the executor is trustee of such residue for the infant within the meaning of this section: *Re Smith*, 42 C. D. 302.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property (*s*) from which the same arise; but so that the

(*s*) Where there is no gift of capital, but only a gift of the life interest in income, it was suggested by North, J., in *Re Wells*, 43 C. D. 281, that the word "property" in sub-sect. 2 of sect. 43 of the Conveyancing Act, 1881, means the income from which the accumulations arise, because to hold in such a case that "property" necessarily means the capital would be to give to those entitled in remainder accumulations of income to which, apart from the statute, the infant would be entitled, and this would not be a proper construction of a section in an Act the object of which is to shorten and simplify conveyancing. This case, however, as well as *Re Humphreys*, [1893] 3 Ch. 1, was decided under sub-sect. 3, having regard to the terms of the Will. In the latter case, Lindley, L. J., expressed some doubt as to the construction of sub-sect. 2 suggested by North, J., in *Re Wells*, and desired to leave the point open until the necessity for deciding it arose. The following comment, which was read with approval by the Court of Appeal in *Re Bowlby*, *infra*, appears in Hood & Challis on the Conveyancing Acts, 6th edit. p. 123: "Reading together the language of sub-sects. (1) and (2), it becomes apparent that the suggestion of North, J., in *Re Wells*, that perhaps, in the latter sub-section, the word 'property' might not mean capital exclusively, attributes to the Act an intolerable degree of looseness in the use of language." In *Re Scott*, [1902] 1 Ch. 918, Buckley, J., expressed the opinion that in sub-sect. 2 the word "property" does not mean *corpus*, but the income from the setting aside and investing of which the accumulations arise, and that the words of sub-sect. 2 should be read thus: "and shall hold those accumulations for the benefit of the person who, in the events which happen, becomes entitled to the property (namely, the income) from the accumulation of which the accumulations arise." This is a decision that, where a contingent life interest is given by a testator to his child in a share of residuary property, the legatee, on the happening of the contingency, will become entitled to the income which has been accumulated in the meantime. The Court of Appeal, however, in *Re Bowlby*, [1904] 2 Ch. 685, held that *Re Scott* was wrongly decided, and that, in the case of a contingent legacy by a father to an infant child, the infant is entitled, not to interest on the legacy, as such, but only to maintenance, although for the purpose of creating a fund and as a matter of convenience, the Court has been in the habit of allowing an annual sum at the rate of 4 per cent. upon the amount of the legacy, and that, should there be a surplus during the infancy, not covered by any order of Court or not received for

trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention (*t*) is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provision therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

It was held (*u*) that the corresponding section of Lord Cranworth's Act applied only to cases in which the legacy was given to the infant either absolutely, or contingently on the infant attaining twenty-one or on some event happening or not happening, and not to cases in which the gift was absolute in

maintenance, the surplus is regarded, according to the practice of the Court, as an accretion to the *corpus* of the contingent legacy. Vaughan Williams, L. J., however, although feeling bound to follow the practice of the Court, yet, on reviewing the authorities, expressed the opinion that to give the accumulations to the remaindermen is altogether outside the intention imputed to the testator.

(*t*) A direction to accumulate the income of a fund given contingently to a class of infants and to pay the same to them as and when their presumptive shares become payable, is not the expression of a "contrary intention": *Re Thatcher's Trusts*, 26 Ch. D. 426. If a Will expressly gives the intermediate income to the residuary legatee, that may amount to the expression of a contrary intention: *per* Kay, J., in *Re Dickson*, 28 Ch. D. at p. 297. But there is no need to look for a contrary intention in such a case, since the Act has no application to income to which the infant cannot become entitled, and the application of the Act is equally prevented whether the interest of the infant in the income is negatived by the income being expressly given to some other person, or whether, by construction of law, the intermediate income falls into the residue or goes to the next of kin as upon an intestacy. See *infra*. If a share of residue is given absolutely to an infant contingently on attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and sect. 43 will apply. But if the infant only becomes tenant for life of the share of residue, with its accretion on attaining twenty-one, the case does not fall within the language of sect. 43, as interpreted by the Court of Appeal in *Re Dickson*, 29 Ch. D. 331: *per* Stirling, J., in *Re Bowlby, ubi supra*. In *Re Humphreys*, [1893] 3 Ch. 1, the Court of Appeal held that the gift of an immediate vested life interest in a share of residuary estate was an expression of a "contrary intention" within sub-sect. 3.

(*u*) *Re Buckley's Trusts*, 22 Ch. D. 583.

the first instance, but liable to be defeated on the infant legatee not attaining twenty-one, or on the happening or not happening of some future event. It has also been held, both under Lord Cranworth's Act and under the Conveyancing Act, that no payments for maintenance can be made out of the income of a fund, unless the interest would go with the capital so as to belong to the infant on the gift of the capital becoming absolute (*x*). It

(*x*) *Re Dickson*, 28 Ch. D. 291; 29 Ch. D. 331 (under the Conveyancing Act); *Re George*, 5 Ch. D. 837 (under Lord Cranworth's Act). In *Re Cotton*, 1 C. D. 232, maintenance was allowed under Lord Cranworth's Act, and the effect of the Act considered by Jessel, M. R. A future devise of lands does not carry the intermediate rents, and maintenance cannot be ordered out of such rents: *Re Eddel's Trusts*, L. R. 11 Eq. 559; *Re Averill*, [1898] 1 Ch. 523; but if you find a testator mixing a gift of realty and personalty in the same clause, this was held by Lord Eldon to justify the conclusion that the testator intended that the same rule should operate on both, and that the intermediate rents of realty and the intermediate income of personalty should (when not expressly disposed of) be both dealt with according to the rule with regard to personalty: *Genery* v. *Fitzgerald*, Jac. 468, 470 (*Re Burton's Will*, [1892] 2 Ch. 38; *Re Adams*, [1893] 1 Ch. 329); and this rule has been extended to cases where the realty and personalty are not given by the same clause, and where the funds are not, strictly speaking, mixed or blended, but merely given for the same object: *Re Dumble*, 23 C. D. 360; *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510; and compare *Hodyson* v. *Bective*, 1 H. & M. 376. In *Re Holford*, [1894] 3 Ch. 30 (overruling *Re Jeffery*, [1891] 1 Ch. 671), a testator gave his residuary personalty upon trust to divide it equally between such of the children of A. living at the testator's death as should attain twenty-one. At the testator's death A. had six children, all infants. The Will contained no maintenance clause. The first child who attained twenty-one claimed one-sixth of the capital, and also, until another child attained twenty-one, the income of the remaining five-sixths:—Held, by the Court of Appeal (affirming the decision of Chitty, J.), that the income of the remaining five-sixths did not belong to the child who had attained twenty-one, but was applicable, under the Conveyancing and Law of Property Act, 1881, s. 43, for the maintenance of the five infants. Lindley, L. J., at page 47, says: "It is true that, if all the members of the class had died under twenty-one, there would have been an intestacy, and the next of kin would have taken the residue; but, notwithstanding that possibility, the Act authorises the application of the income towards the maintenance of the members of the class whilst all are under age. This was decided, and quite rightly, in *In re Adams*, [1893] 1 Ch. 332. So although, if those children who are still under age should die under twenty-one, the child who has attained twenty-one will take their shares, still the Act authorises the application for their maintenance

is also clear that, if the gift depends on a further contingency, so that the infant legatee will not necessarily become entitled on attaining twenty-one or sooner, this section of the Conveyancing Act does not apply, since the section only applies to property to which the infant is entitled either absolutely or contingently on attaining twenty-one, or on the occurrence of an event *before his attaining that age*, and the infant in the case here supposed may attain twenty-one, and yet never become entitled (*y*).

(2) independently of statute.

Under such circumstances as are indicated in the last paragraph, and in other cases to which the Conveyancing Act does not apply, the old rules of equity with regard to payment of income by way of maintenance still hold good. The general principle was that payments may be made for maintenance out of the income of a legacy only when the legacy is vested in possession (*z*), not when it is vested and payable *in futuro* (*a*), nor when it is contingent (*b*). If the gift is in the first instance

of the income of their contingent shares, for that income contingently belongs to them. This conclusion is perfectly consistent with the decision of this Court in *In re Dickson*, 29 Ch. D. 331; for the interest on the legacy there in question did not follow the legacy before it became vested, but was payable to persons other than the legatee. The Court held that sect. 43 did not authorise the maintenance of an infant out of income which did not, and never could, belong to him; but the Act was clearly intended to authorise, and does authorise, his maintenance out of income which will become his if he lives long enough to acquire a vested interest in the property from which the income arises." The principle of *In re Holford* was treated by North, J., in the subsequent case of *Re Jeffery*, [1895] 2 Ch. 577, as applicable to the case of a class which is capable of increase, no less than to the case of a class which is not so capable.

(*y*) *Re Judkin's Trusts*, 25 Ch. D. 743.

(*z*) *Collis* v. *Blackburn*, 9 Ves. 470; *Stretch* v. *Watkins*, 1 Madd. 253. For the question what legacies are vested in possession, see Pt. III. Bk. III. Ch. II. § V. p. 954.

(*a*) *Descrambes* v. *Tomkins*, 4 Bro. C. C. 149, n. See as to the question whether a deferred legacy carries interest in the meanwhile by reason of its severance from the rest of the testator's estate, *Festing* v. *Allen*, 5 Hare, 575; *Re Judkin's Trusts*, 25 Ch. D. 743, 747; *Re Inman*, [1893] 3 Ch. 518; *Re Clements*, [1894] 1 Ch. 665; and *post*, p. 1167; and as to the applicability towards maintenance of intermediate income until the legatees attain a vested interest, where the property bequeathed is so severed, see *Re Woodin*, [1895] 2 Ch. 309; *Re Clements*, *ubi supra*; *Re Bowlby*, [1904] 2 Ch. 685; and cf. *Hanson* v. *Graham*, 6 Ves. 239, 249; *Mitchell* v. *Bower*, 3 Ves. 283, 288.

(*b*) *Butler* v. *Freeman*, 3 Atk. 58; *Gotch* v. *Foster*, L. R. 5 Eq. 311. But this must be limited to the case where the legacy is of capital,

absolutely vested in possession, it is immaterial that it is liable to be defeated (*c*) on the legatee not attaining twenty-one, or on the happening or not happening of any future event, unless there is also a direction to postpone payment (*d*). It may be stated generally that, if the income as it accrues from year to year becomes the infant's property absolutely, then the income or part of it may be applied to maintenance; otherwise not. It is hardly necessary to add that an executor must be careful not to pay money for the maintenance of an infant until it is clear that, on the final settlement of all accounts relating to the testator's estate, there will be a clear fund out of the income of which maintenance can be provided (*e*).

Exceptions to general rule.

The exceptions to the above general rule, as well as the rule itself, depend on the well-recognised principle that every Will must be interpreted according to the intention of the testator as shown by the Will. Accordingly, the gift of a legacy not vested in possession carries with it the right to intermediate maintenance whenever the Will, either expressly or by implication, authorises the provision of maintenance. The testator's intention that the legatees shall be maintained out of the property bequeathed to them may be inferred from a gift over of the interest or from other circumstances (*f*). In two classes of cases a rule of construction has grown up by which such an intention is regularly implied, in the absence of directions to the contrary. The first of these classes comprises the cases in which the donor was the father of the legatee or stood *in loco parentis* towards him. In that case the executor may allow maintenance out of the income of a legacy, even though contingent (*g*), or vested and payable *in futuro* (*h*). It is presumed that the parent

First class of exceptions.

for where the contingent legacy is a legacy of capital and accumulated interest, or of interest with accumulations, maintenance may, it would seem, be allowed: *Re Wells*, 43 C. D. 281.

(*c*) It will be remembered, however, that trust property in which the infant has a defeasible interest is not within the statutes, and therefore that it is not under the statutes, but *dehors* them that maintenance in such a case is allowed.

(*d*) *Taylor* v. *Johnson*, 2 P. Wms. 504. See also *Re Buckley's Trusts*, 22 Ch. D. 583, and the chapter on Interest, *post*, p. 1169. Maintenance may be allowed out of any interest to which the infant is entitled.

(*e*) *Warter* v. *Anon.*, 13 Ves. 92; *Batt* v. *Anns*, 11 L. J. Ch. 52.

(*f*) *Sandars* v. *Millar*, 25 Beav. 154.

(*g*) *Chambers* v. *Goldwin*, 11 Ves. 1; *Martin* v. *Martin*, L. R. 1 Eq. 369.

(*h*) *Green* v. *Belcher*, 1 Atk. 507. In the case of a legacy to a child,

intended to provide for his children's support during infancy. But this exception holds good only when the testator has provided no other means of maintenance for the children. For if he has provided any other means of maintenance, however small, the presumption of intention is rebutted, and the Court will authorise no further allowance, unless indeed the legacy be vested (*i*). It should be noticed that this rule of construction relating to legacies given by persons *in loco parentis* has not been extended to legacies given by husbands to wives, or given to any other relations than children, unless in fact the testator stood towards them *in loco parentis* (*k*).

Second class of exceptions.

The second class of exceptions, in which maintenance may be allowed out of legacies not vested in possession, comprises cases in which a legacy is given contingently to members of a class of infants in either of the following cases. (1) If it is inevitable that one or more members of the class will ultimately take (*l*), or (2) if the consent of all parties who may be ultimately interested in reversion or otherwise has been obtained. Speaking of the former of these cases, Lord Eldon says in *Ex parte Kebble* (*m*): "The cases after great struggle go this length, that where there are equal legacies to a class of children, even with a

let the testator give it how he will, either at twenty-one or marriage, or payable at twenty-one or marriage, and the child has no other provision, the Court will give interest by way of maintenance, for it will not presume a father so unnatural as to leave a child destitute: *Heath* v. *Perry*, 3 Atk. 101; *Crickett* v. *Dolby*, 3 Ves. 10.

(*i*) *Mitchell* v. *Bower*, 3 Ves. 283; *Hearle* v. *Greenbank*, 3 Atk. 716; *Wynch* v. *Wynch*, 1 Cox, 433; *Ellis* v. *Ellis*, 1 Sch. & Lef. 1; *Re George*, 5 C. D. 837. See *post*, p. 1168. In *Re Moody*, [1895] 1 Ch. 101, the Will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions of sect. 43 of the Conveyancing Act, 1881, were applicable; and Kekewich, J., held that, reading sect. 43 into the Will, there was nothing in the Will to displace the application of the general rule applicable to legacies to infant children, and, accordingly, that the legacies to the son and daughter respectively carried interest as from the death of the testator. His Lordship remarked (p. 109): "It seems to me that a provision for payment of maintenance to any child out of the income of his share of residue given to him with the other children does not come within the exception mentioned by James, L. J., in the case of *In re George*, where the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose."

(*k*) See *post*, p. 1164.

(*l*) *Haley* v. *Bannister*, 4 Madd. 275.

(*m*) 11 Ves. 606.

direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship in case of the death of any under that age to the others, the chance of all taking or the survivor being equal, the Court takes the fund which belongs to all, and must go to all or some of them, and maintains them all out of the interest (*n*). But the principle cannot be applied where the legacy is not given absolutely to the children and the survivor, but in the case of the death of a child under twenty-one, there is a limitation to the issue; who, for that purpose, are as strangers: In this case, as in that, the property may never belong to any of the children" (*o*).

In the case of a legacy to a class contingently on attaining twenty-one, with benefit of survivorship to the rest in the event of any of the class dying before twenty-one, it is necessary to obtain the consent of any of the class who have attained twenty-one at the time when the payment for maintenance is desired, as well as that of the remaindermen (*p*). A direction to accumulate does not prevent the application of the income for maintenance (*q*). The possibility of future members of the class coming into existence does not prevent the allowance of maintenance for those who already exist (*r*). It would appear, from some remarks of Sir G. Jessel, M. R., in *Re Breed's Will* (*s*), that a trustee or executor can never, on his own authority, make payments for maintenance in the case of a contingent gift to

(*n*) See also to the same effect the subsequent cases of *Marshall* v. *Holloway*, 2 Swanst. 436, and *Haley* v. *Bannister*, 4 Madd. 275.

(*o*) See *Errat* v. *Barlow*, 14 Ves. 202; *Marshall* v. *Holloway*, 2 Swanst. 436; *Ex parte Whitehead*, 2 G. & J. 249; *Turner* v. *Turner*, 4 Sim. 430; *Cannings* v. *Flower*, 7 Sim. 523.

(*p*) See Simpson on Infants, 2nd edit. 282; *Re Breed's Will*, 1 C. D. 226.

(*q*) *Mole* v. *Mole*, 1 Dick. 310; *McDermott* v. *Kealey*, 3 Russ. Ch. C. 264; *Martin* v. *Martin*, L. R. 1 Eq. 369; *Re Allen*, 17 C. D. 807; *Re Colgan*, 19 C. D. 305; *Re Thatcher's Trusts*, 26 C. D. 426; *Re Collins*, 32 C. D. 229. But where a testator has by his Will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the Court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for the maintenance and education of the person who will, if he is living at the end of the term, be the tenant for life, even if there is no other way in which a provision can be made for his maintenance and education: *Re Alford*, 32 C. D. 383.

(*r*) See *per* Lindley, L. J., in *Re Holford*, [1894] 3 Ch. at p. 46, and *Re Jeffery*, [1895] 1 Ch. 577.

(*s*) 1 C. D. 226.

a class. In such a case it is certainly wiser to apply to the Court (*t*).

In order to provide maintenance for infants who are only contingently entitled upon attaining twenty-one, where there is nothing in the instrument to warrant maintenance, the course has been taken of effecting a policy of insurance, so as in the event of the infant dying under twenty-one to recoup the amount paid for maintenance and for the premiums upon the policy (*u*). To effect the same result the plan has also been adopted of charging other interests of an infant under the same Will to secure the recouping of sums to which the remainderman would be entitled if a contingency did not occur (*x*).

No maintenance allowed as a general rule in lifetime of father if he be of ability.

As a general rule the Court will not allow maintenance to an infant during the lifetime of the infant's father, if the father be of ability (*y*); and the executor will therefore pay it at his peril. It must be noticed that the father's ability must be understood in the sense of ability to maintain and educate according to the fortune and expectations of the infant, and the infant's needs must be considered with reference to the same standard of fortune and expectation. Thus in *Jervois* v. *Silk* (*z*), 1,200*l.* a year was allowed for maintenance although the father had an income of 6,000*l.* (*a*).

(*t*) See, however, where the property bequeathed is severed from the rest of the testator's estate, *Re Woodin*, [1895] 2 Ch. 309; *Re Clements*, [1894] 1 Ch. 665. See also sect. 43 of the Conveyancing Act, 1881; *Re Holford*, *ubi supra*; and *Re Jeffery*, [1895] 2 Ch. 577.

(*u*) *Re Arbuckle*, 14 W. R. 535; *De Witte* v. *Palin*, L. R. 14 Eq. 251. But see and compare *Re Hamilton*, 31 C. D. 291; *Cadman* v. *Cadman*, 33 C. D. 397.

(*x*) *Re Colgan*, 19 C. D. 305.

(*y*) *Butler* v. *Butler*, 3 Atk. 60; *Darley* v. *Darley*, 3 Atk. 399.

(*z*) Coop. 52.

(*a*) See also *Ex parte Williams*, 2 Coll. 740. Another exception to the general rule (*ante*, p. 1145) is where a testator has made a provision for a family, in the ordinary sense of the word, that is, the children of a particular *stirps* in succession or otherwise, but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate. It is assumed that he did not intend that the children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the Court has accordingly found, from the earliest times, that, where an heir-at-law is unprovided for, maintenance ought to be provided for him: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Re Allen*, 17 C. D. 807; *Re Collins*, 32 C. D. 229. In *Re Colgan*, 19 C. D. 305, the Court ordered a sum for maintenance of infants, entitled to con-

Amount allowed.

The amount allowed for maintenance depends partly on the age and quality of the infant, and partly on the amount of the fund. When the total fund is small, the whole income may be allowed (*b*). In other cases no rule has been established to fetter

tingent legacies and a share of residue, to be paid in excess of the sum mentioned in the Will of the testator, but charged the increased allowance on the interests ultimately coming to them under the Will in the residue of the testator's estate. It would seem, however, that the Court will not, where there is a trust for accumulation, order a sum to be paid for the education or maintenance of the person who is to succeed to the property in the absence of special circumstances: *Re Alford*, 32 C. D. 383. See also *Josselyn* v. *Josselyn*, 9 Sim. 63. Even where there is an express provision for the maintenance of an infant legatee, it has been laid down, that the Court will not permit such provision to be applied, if the parent be of ability to maintain the infant legatee: *Andrews* v. *Partington*, 3 Bro. C. C. 60; *S. C.*, 2 Cox, 223. But though a father is undoubtedly bound to maintain and educate his children, yet it is competent for him to contract that certain property shall be applied to those purposes. Accordingly, in *Meacher* v. *Young*, 2 M. & K. 490, Leach, M. R., held that, if under a marriage contract a fund has been settled upon trust for the children of the marriage at twenty-one, with a proviso that till their shares become payable the interest shall be applied towards their maintenance, the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them. See also *Stocken* v. *Stocken*, 4 Sim. 152; 4 Myl. & C. 95; *Hawkins* v. *Watts*, 7 Sim. 199; *Thompson* v. *Griffin*, 1 Cr. & Ph. 317. And for a further relaxation of the rule, see *Hoste* v. *Pratt*, 3 Ves. 733; *Sisson* v. *Shaw*, 9 Ves. 285; *Maberly* v. *Turton*, 14 Ves. 499; *Brophy* v. *Bellamy*, L. R. 8 Ch. 798. If trustees refuse to exercise their discretion as to maintenance the Court will direct an inquiry: *Maberly* v. *Turton*, *ubi supra*. If, however, in an honest exercise of their discretion they refuse to contribute towards an infant's maintenance, the parents being in prosperous circumstances, the Court will not interfere and compel them: *Re Bryant*, [1894] 1 Ch. 324. Where there is a trust for maintenance in a settlement made upon marriage, and the father has maintained the children without calling for a contribution from the fund, he is in the position of purchaser of so much of the fund as it would have been proper to apply towards maintenance: but this rule applies only where the trust for maintenance is contained in an antenuptial marriage settlement which has a basis of contract to support it: *Re Kerrison's Trusts*, L. R. 12 Eq. 422; *Wilson* v. *Turner*, 22 C. D. 521.

(*b*) *Brown* v. *Smith*, 10 C. D. 377; *Re Hodges*, 7 C. D. 754, where the whole income was allowed by the Court contrary to the discretion of the trustees; *Re Roper's Trusts*, 11 C. D. 272, where the Court ordered the income to be paid to the father, the mother not having exercised a sound discretion. In *Tabor* v. *Brooks*, 10 C. D. 273,

the discretion of the Court: a reference to the cases in the note (*c*) will show the proportion of the income that has in different cases been allowed. When the income fluctuates, the executor or trustee may generally calculate the amount to be allowed for maintenance on the basis of the average annual income. It has been held that the executor or trustee may, in some cases, make use of past accumulations for the purpose of maintenance; but this depends upon the wording and construction of the Will (*d*). In some cases the amount allowed for maintenance has been increased in order to provide for the parents or brothers or sisters of the infant, on the ground that it is for the infant's interest to have his near relations living in respectable circumstances (*e*). But this principle appears to apply only to such relations of the infant as reside in the same home with him (*f*).

Two or more funds applicable.

Where there are two or more funds applicable to the maintenance of an infant, the interest of the infant alone will determine which of the funds is primarily liable (*g*).

Allowances for past maintenance.

With regard to allowances for past maintenance of an infant, the general rule is that the Court will not direct an inquiry as to the propriety of an allowance to the *father* unless a special case be made (*h*). The Court, however, is not so strict in the matter

however, the trustees' discretion being "uncontrolled and irresponsible," the Court declined to interfere, there being no proof of *mala fides*, though of opinion the trustees were acting injudiciously in paying the whole income to the father.

(*c*) *Re Allsop*, C. P. C. 44; 7 L. J. Ch. 194; *Ex parte Williams*, 2 Collyer, 740; *Nunn* v. *Harvey*, 2 De G. & Sm. 301; *Re Herons, Minors*, 3 Ir. Eq. Rep. 589; *Moor* v. *Lacy*, Macph. Inf. App. III.; *Barnes* v. *Ross*, [1896] A. C. 625. And see generally Simpson on Infants and Eversley on Domestic Relations.

(*d*) See Simpson on Infants, 2nd edit. 299.

(*e*) *Wellesley* v. *Beaufort*, 2 Russ. 28; *Lanoy* v. *Athol*, 2 Atk. 447; *Petre* v. *Petre*, 3 Atk. 511; *Allen* v. *Coster*, 1 Beav. 202; *Bradshaw* v. *Bradshaw*, 1 J. & W. 647; *Brown* v. *Smith*, 10 C. D. 377.

(*f*) See Simpson on Infants, 2nd edit. 302 *et seq.*; *Re Stables*, 21 L. J. Ch. 620. Compare, however, *Heysham* v. *Heysham*, 1 Cox, 179.

(*g*) *Foljambe* v. *Willoughby*, 2 Sim. & S. 165; *Lygon* v. *Coventry*, 14 Sim. 41; *Lucas* v. *King*, 11 W. R. 818; *Martin* v. *Martin*, L. R. 1 Eq. 369; *Re Wells*, 43 C. D. 281; *post*, p. 1168.

(*h*) *Ex parte Bond*, 2 My. & K. 439. For cases where the Court has found such special circumstances, see *Reeves* v. *Brymer*, 6 Ves. 425; *Sherwood* v. *Smith*, 6 Ves. 455; *Collis* v. *Blackburn*, 9 Ves. 470; *Maberly* v. *Turton*, 14 Ves. 499; *Stopford* v. *Lord Canterbury*, 11 Sim. 82; *Stephens* v. *Lawry*, 2 Y. & C. C. C. 87; *Carmichael* v. *Hughes*, 20 L. J. Ch. 396.

of past maintenance in cases other than that of a father: thus an executor (not a father) may be allowed maintenance for the time past (*i*). This allowance, even in the case of a mother, must be limited to what has actually been expended upon such maintenance, though such expenditure may have been less than what the amount of the child's fortune would have justified (*k*). Where a mother made advances to a son during his minority, and not with the intention of afterwards claiming against his estate, it was held that there was no debt due to her for maintenance during such minority, and it was also held that to support a claim by a mother for maintenance during a period after the son attained majority, there must have been a contract; and as none had been shown the claim was disallowed (*l*). The case of *Brown* v. *Smith* (*m*), which was said by Brett, L. J., to be a case of past maintenance, seems in the circumstances of the case to have been rather in the nature of an application for an *ex post facto* approval by the Court of the sum paid as maintenance by the trustees to the mother of the infant. The principle that is to govern the allowance of past maintenance is laid down in that case by the learned Lord Justice as follows:—"Two questions arise, first, what would the Court have allowed, and, secondly, what amount has been expended. The Court cannot allow the trustee all he has expended, if he has expended more than it would have sanctioned; and it cannot allow him as much as it would have sanctioned if he has not expended so much."

Maintenance out of capital.

As regards maintenance out of capital, it was said by Sir W. Grant (*n*), that it had very rarely occurred that the Court had broken in upon the capital of a legacy for the mere purpose of maintenance, though frequently for the purpose of putting out the child for life. However, in *Ex parte Green* (*o*), the petition prayed, that the principal of the sum of 298*l.* belonging to two infants might from time to time be applied to their maintenance: They had no other property, except some copyhold premises yielding about 6*l.* per annum: Sir

(*i*) *Sisson* v. *Shaw*, 9 Ves. 285; *Greenwell* v. *Greenwell*, 5 Ves. 194.

(*k*) *Bruin* v. *Knott*, 1 Phil. Ch. C. 572.

(*l*) *Re Cottrell's Estate*, L. R. 12 Eq. 566.

(*m*) 10 C. D. 377.

(*n*) *Walker* v. *Wetherell*, 6 Ves. 474.

(*o*) 1 J. & W. 253.

Thomas Plumer said, that as the sum was so small, he would venture to make the order; and the order was made without a reference (*p*).

Advancement.

Similar principles to those regulating the power of executors to allow maintenance regulate their power to pay money for the purpose of the advancement of infants. The word "advancement" is commonly used, in contradistinction to maintenance, to describe payments made for the purpose of ensuring a permanent benefit to an infant, generally by establishing him in some profession or career. It can seldom, if ever, be advisable for the executor to make such a payment without the sanction of the Court, but the rule laid down by Lord Alvanley in *Lee* v. *Brown* (*q*) applies to advancement as well as to maintenance. The Court has less reluctance to break in upon the capital for the purpose of advancement than for the purpose of maintenance, since advancement is regarded as an investment of the infant's capital for his future benefit (*r*). It is to be noticed that the Conveyancing Act, 1881, applies only to payments out of the income of the infant's property. Advancement out of capital depends, therefore, on the old law as explained above with regard to maintenance. When advancement is expressly authorised by the Will, the executor may of course always apply the infant's property to that purpose, subject to the terms of the Will.

Mode of application for maintenance to Court.

Applications for the allowance of maintenance or advancement (except when there is an action or matter pending affecting the infant's property, when they should be made by summons in the action) are directed to be made at chambers in the Chancery Division by an originating summons, which should be served on all persons interested in the fund out of which the maintenance or advance is to be paid and supported by an affidavit setting forth the facts on which the application depends (*s*).

(*p*) See also *Barlow* v. *Grant*, 1 Vern. 254; *Harvey* v. *Harvey*, 2 P. Wms. 23; *Payne* v. *Low*, 1 Russ. & M. 223; *Re England*, *ibid.* 499; *Ex parte Swift*, *ibid.* 575; *Ex parte Chambers*, *ibid.* 577; *Bridge* v. *Brown*, 2 Y. & C. C. C. 181; *Carmichael* v. *Wilson*, 3 Moll. 79; *Nottley* v. *Palmer*, 14 W. R. 170; 13 L. T. N. S. 647; *Re Clarke*, 17 Jur. 362; *Re Howarth*, L. R. 8 Ch. 415. See, however, *Re Hamilton*, 31 C. D. 291; *Cadman* v. *Cadman*, 33 C. D. 397.

(*q*) 4 Ves. 362, *ante*, p. 1141.

(*r*) *Walker* v. *Wetherell*, 6 Ves. 474.

(*s*) See R. S. C., Ord. 55. rr. 2 (12) and 25.

In case of *feme covert* legatee.

If a legacy were given to a married woman the rule at common law was that it must be paid to the husband (*t*). So where a legacy was given to a married woman, living separate from her husband, with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again with interest (*u*). It was also adjudged, that if the husband and wife were divorced *à mensâ et thoro*, and a legacy were left to her, the husband alone might release it (*x*), and consequently, to him alone it was payable (*y*). But by the Matrimonial Causes Act (20 & 21 Vict. c. 85), which declares that thereafter a decree for a judicial separation shall take the place of divorce *à mensâ et thoro*, it is provided (sect. 25), that a wife who has been judicially separated from her husband shall from the date of the sentence be considered a *feme sole* in respect of any property which may come to or devolve upon her, and if she die intestate such property shall go as if her husband were then dead: and a wife who has obtained a protection order under section 21 is entitled to payment of a legacy bequeathed to her (*z*).

But this right of the husband to receive a legacy given to the wife was considerably modified by the doctrines of separate property and of the wife's equity to a settlement.

Separate property of wife.

Even before the passing of the Married Women's Property Act, 1882, a legacy given to the *separate use* (*a*) of a married woman vested in her personally, and she alone could give a good discharge for it. The effect of this Act is that women married after the commencement of the Act (1 Jan., 1883) are entitled to hold as their separate property any legacy, and that women married before the commencement of the Act are so entitled if their title to the legacy, whether vested or contingent, and

(*t*) See *ante*, p. 571.

(*u*) *Palmer* v. *Trevor*, 1 Vern. 261; Toller, 320.

(*x*) *Stephens* v. *Totty*, Cro. Eliz. 908.

(*y*) See *Green* v. *Otte*, 1 Sim. & Stu. 250.

(*z*) See *ante*, p. 48; *Re Kingsley's Trusts*, 26 Beav. 84; *Cooke* v. *Fuller*, *ibid.* 99. A fund given to trustees in trust for a wife did not, even before the Felony Act, 1870 (33 & 34 Vict. c. 23), vest in the Crown: *Re Harrington*, 29 Beav. 24.

(*a*) It should also be noticed that ever since the Married Women's Property Act, 1870, a legacy not exceeding 200*l.* given to a married woman has been her separate property, and her receipt was a good discharge for the same: 33 & 34 Vict. c. 93, s. 7. See *ante*, p. 571, n. (*i*).

whether in possession, reversion, or remainder, accrues after the commencement of the Act. Where, therefore, a legacy is separate property either independently of or by reason of the Act, an executor must pay such legacy to the wife personally and she alone can give a good discharge for it.

Wife's equity to a settlement.

Owing to the Married Women's Property Act questions of a wife's equity to a settlement arise much less frequently, but, inasmuch as cases may still occur outside this Act, it is still necessary to examine shortly into the subject (*b*).

If the husband has not made any provision for his wife, the executor may decline to pay the legacy (however small the amount (*c*)), until her husband consents to make a suitable settlement upon her; as the Court of Chancery, upon the bill of the husband for the money, would refuse to order payment to him, unless he consented to a reasonable settlement out of it upon the legatee (*d*). Nor does the Court confine its interposi-

(*b*) Such cases will only occur in respect of women married before the commencement of the Act whose title to the property in question accrued before that time. It is to be remembered that if a woman married before the commencement of the Act has before that time acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, it is not made her separate estate by sect. 5 (1) of the Act, though it falls into possession after the Act: *Reid* v. *Reid*, 31 C. D. 402. See *ante*, pp. 49, 673, note (*n*).

(*c*) If the amount of the legacy does not exceed 200*l.*, the consent of the wife in Court to waive her right is not requisite for an order to pay the amount to her husband: But if she insists on her equity for a settlement, the modern doctrine appears to be that she must have it, however small the sum: *Re Cutler*, 14 Beav. 220; *Re Kincaid*, 1 Drewr. 326 (overruling *Foden* v. *Finney*, 4 Russ. 428). The Court will sometimes, to save expense, dispense with the rule as to requiring the consent in Court of the wife, although the sum is somewhat above 200*l.*: *Roberts* v. *Collett*, 1 Sm. & G. 138.

(*d*) *Browne* v. *Elton*, 3 P. Wms. 202; *Lady Elibank* v. *Montolieu*, 5 Ves. 742, in note. But the husband is entitled to the *interest* of his wife's property, though he refuses to make a settlement on her: *Sleech* v. *Thorington*, 2 Ves. Sen. 562, by Sir Thomas Clarke, M. R. See also *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 271. As to how much of the sum bequeathed should be settled on the wife; according to the old practice and in ordinary cases, where there was no misconduct, the fund used to be divided equally between the husband (or those claiming through him) and the wife: But according to the modern practice, the amount to be settled is discretionary, and depends on the particular circumstances of each case: *Re Suggitt's Trusts*, L. R. 3 Ch. 215. See *Spirett* v. *Willows*, L. R. 1 Ch.

tion in favour of the wife, and compel a provision for her, against those persons only, who are seeking to obtain her property by the assistance of the Court; but, in extension of the principle of those cases in which equity used to restrain the husband from proceeding in the Ecclesiastical Court, because that jurisdiction could not enforce a settlement for the wife, will entertain a bill by a married woman against an executor or administrator and the husband, praying for a provision out of a

520; L. R. 4 Ch. 407. And though the rule was, in Lord Eldon's time, that the whole of the fund could not be given to the wife, it is now fully established that where the wife is deserted, or the husband is unable to maintain her, or there are other special circumstances entitling the wife to have the whole fund settled, the Court has the power to order such a settlement: *Scott* v. *Spashett*, 3 Mac. & G. 599; *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390; *Re Kincaid*, 1 Drewr. 326; *Koeber* v. *Sturgis*, 22 Beav. 588; *Squires* v. *Ashford*, 23 Beav. 132; *Duncombe* v. *Greenacre*, 29 Beav. 578; *Ward* v. *Yates*, 1 Dr. & Sm. 80; *Smith* v. *Smith*, 3 Giff. 121; *Re Groves*, *ibid.* 575; *Barrow* v. *Barrow*, 5 De G. M. & G. 782; *Re Cordwell's Estate*, L. R. 20 Eq. 644; *Taunton* v. *Morris*, 11 C. D. 779; *Boxall* v. *Boxall*, 27 C. D. 220; *Reid* v. *Reid*, 33 C. D. 220. The wife's equity includes all unsettled property to which she is entitled, whether it be vested in her in interest before or after the marriage: *Vaughan* v. *Buck*, 1 Sim. N. S. 284; *Barrow* v. *Barrow*, 18 Beav. 529, 534. The mere fact that a settlement was made on the marriage of part of her property does not entitle the husband to be treated as a purchaser of the residue: *ibid.* But in considering the question of the wife's equity, the Court will take into account, not only all moneys of the wife previously received by the husband, but also all moneys which have been settled on the wife: *Re Erskine's Trust*, 1 K. & J. 302. Compare *Roberts* v. *Cooper*, [1891] 2 Ch. 335, as to the wife's equity as against an assignee. A wife has the same equity to a settlement out of property in which she has only a life interest as out of property in which she has an absolute interest: *Taunton* v. *Morris*, 11 C. D. 779; but she has no equity to a settlement out of property given for the benefit of herself and her husband during their joint lives, and the life of the survivor of them: *Re Bryan*, 14 C. D. 516; nor out of arrears of past income of real or leasehold property which the husband has assigned to a particular assignee: *Re Carr's Trusts*, L. R. 12 Eq. 609. It may be observed that the wife has no equity to a settlement against her own creditors, for it is plain that there can be no equity to a settlement till the wife's debts are provided for: *Barnard* v. *Ford*, L. R. 4 Ch. 247. As to the form of the settlement, see *Spirett* v. *Willows*, L. R. 4 Ch. 407; *Croxton* v. *May*, L. R. 9 Eq. 404; *Walsh* v. *Wason*, L. R. 8 Ch. 482; *Oliver* v. *Oliver*, 10 C. D. 765; *Cogan* v. *Duffield*, 2 C. D. 44, 49; *Re Gowan*, 17 C. D. 778; *Re Parrott*, 33 C. D. 274.

legacy bequeathed to her, or out of a share of an intestate's estate, to whom she is next of kin (*e*).

Where wife guilty of misconduct and living apart from husband.

But if the wife be an adulteress living apart from her husband, a Court of Equity will not interfere upon her application for a settlement to her separate use out of a legacy given to her: neither will it order the legacy to be paid to her husband; not to the former, because she is unworthy of the Court's notice or interference; nor to the latter, because he does not maintain her, in respect of which duty only the law gives to him her fortune (*f*). It may, however, be inferred from the case of *Ball* v. *Montgomery* (*g*), that though the Court may not make a settlement on the wife then living in adultery, yet that it will secure her trust property for the benefit of the survivor, or of the children (*h*).

Where wife not guilty of misconduct but living apart from husband.

Again, where no criminality attaches to the wife, but while she is living apart from her husband, under a deed of separation, a legacy is given to her, as the Court will interpose in her behalf for a provision, and the husband is entitled to the money upon making it, the executor may insist upon a settlement on the wife, as a condition preceding his paying the legacy to the husband (*i*). Accordingly it has been held, that a married

(*e*) *Lady Elibank* v. *Montolieu*, 5 Ves. 737; Toller, 321. So where a married woman was entitled under a Will to a legacy charged on land, with power of entry and receipt of the rent and profits, it was held by Lord Campbell, C., affirming the decision of Romilly, M. R., that this power did not deprive the legacy of its equitable character, so as to enable the husband to assign it free from the wife's equity to a settlement, but that the Court would, at the suit of the wife, and on the devisee paying the legacy into Court, restrain the husband's assignee from enforcing the legal remedies for the recovery of the legacy: *Duncombe* v. *Greenacre*, 28 Beav. 472; 2 De G. F. & J. 509. So a settlement of the personal estate of an intestate was directed in favour of a married woman, who was his sole next of kin, though her husband, being his administrator, could obtain possession of it at law: *Smith* v. *Matthews*, 2 De G. F. & J. 139. As to the origin and nature of the wife's equity to a settlement, see the judgment of Turner, V.-C., in *Osborn* v. *Morgan*, 9 Hare, 432.

(*f*) *Carr* v. *Eastabrooke*, 4 Ves. 146; 1 Rop. Husb. & Wife, 375, 2nd edit.

(*g*) 2 Ves. 191; 1 Rop. Husb. & Wife, 276, 2nd edit.

(*h*) The Court, under very peculiar circumstances, ordered the whole income of a fund in Court belonging to a wife who was an adulteress, to be paid to her, on terms: *Re Lewin's Trust*, 20 Beav. 378.

(*i*) *March* v. *Head*, 3 Atk. 720; 1 Rop. Leg. 773, 3rd edit.

woman who had left her husband and was living separate from him, but not in a state of adultery, was held to be entitled to a settlement out of a sum of stock to which her husband had become entitled in her right (*k*).

Wife may waive right to settlement.

However, whether the husband shall make any provision, before he receives the legacy, depends solely upon the wife, who may waive her right by appearing in Court and consenting to his receiving it (*l*); even though the clear amount payable has not been ascertained (*m*). Hence, although in making a provision for the wife, the Court always includes the children of the marriage (*n*), yet the wife's title to a settlement is, according to the most approved opinions, *personal* to her, and does not extend to her children (*o*): so that if she be entitled to her legacy, and die, leaving a husband and children, the latter, although unprovided for by settlement, can claim no provision out of the legacy (*p*); and if he files a bill to recover such legacy, his children cannot oblige him to make a provision for them out of it (*q*). Where, indeed, there was a decree for a settlement on the wife, the children were entitled to the benefit of it, although the wife might have died before any proposal for a settlement was carried into the Master's office (*r*). Neverthe-

(*k*) *Eedes* v. *Eedes*, 11 Sim. 569.

(*l*) A married woman, while an infant, would not have been allowed to waive her equity to a settlement: *Shipway* v. *Ball*, 16 C. D. 376; nor if she was a ward of Court, and had married without its authority: *Stackpole* v. *Beaumont*, 3 Ves. 89. If a wife waives her equity to a settlement, and consents that her husband shall have the property, the Court requires an affidavit by the husband and wife that no previous settlement affecting the property has been made: *Britten* v. *Britten*, 9 Beav. 143. Such affidavit, however, has been dispensed with, where the property in question has been very small: *Veal* v. *Veal*, L. R. 4 Eq. 115.

(*m*) *Packer* v. *Packer*, 1 Coll. 92.

(*n*) See *Groves* v. *Clarke*, 1 Keen, 140. If there are no special circumstances, the Court provides for the wife for life out of the fund, and afterwards gives it to the issue, if any, with an ultimate reversion to the husband or his representatives: *Spirett* v. *Willows*, L. R. 1 Ch. 520; *Croxton* v. *May*, L. R. 9 Eq. 404. In the latter case, *Carter* v. *Taggart*, 1 De G. M. & G. 286, and *Bayshaw* v. *Winter*, 5 De G. & Sm. 466, were questioned.

(*o*) *Winch* v. *Brutton*, 14 Sim. 379. See stat. 20 & 21 Vict. c. 57, enabling a wife, after Dec. 31, 1857, to release and extinguish her right or equity to a settlement.

(*p*) See *Ranking* v. *Barnard*, 5 Madd. 33.

(*q*) *Scriven* v. *Tapley*, Ambl. 509; *Murray* v. *Lord Elibank*, 10 Ves. 84; 1 Rop. Husb. & Wife, 264, 2nd edit. See *Lovett* v. *Lovett*, Johns. 118.

(*r*) *Rowe* v. *Jackson*, 2 Dick. 604; *Fenner* v. *Taylor*, 1 Sim. 171;

less, if the wife, after the institution of the suit, to which she is a party defendant, for administering the estate out of which the legacy is to be paid, appears in court, and consents that her husband shall have the fund wholly and absolutely, it will be so ordered, and the children will be deprived of any provision out of it (*s*). Hence it appears to follow that the wife's equity does not attach, for the benefit of her children, upon the mere filing of the bill (*t*). But in *Lloyd* v. *Mason* (*u*), where the wife appeared by her counsel at the hearing of the cause and claimed her equity, and the legacy was directed to be carried to the separate account of the husband and wife; and, the husband being a bankrupt, and his assignee having sold his interest in the legacy, the solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel, who determined that she was entitled to a settlement, subject to the costs: but before any further steps were taken, she died, leaving children; it was held by Sir J. Wigram, V.-C., that the husband and those claiming through him were, after the steps which had been taken, bound to allow a settlement of part of the fund on the wife and children, and that on her death the children were entitled to the portion which would have been settled: And his Honour observed, that the question whether the children could, after the death of their mother, insist on her equity, depended, not on the question whether she was bound, but whether her husband was: That there might be a case in which she was not absolutely bound, but in which, as against

Groves v. *Perkins*, 6 Sim. 584; *De la Garde* v. *Lempriere*, 6 Beav. 343, 345, *per* Lord Langdale. And it will make no difference, that by the form of the decree, made without discussion, the settlement to be made is a settlement on the wife alone, and not on the wife and her children: *Groves* v. *Clarke*, 1 Keen, 132.

(*s*) *Murray* v. *Lord Elibank*, 10 Ves. 88, 90; *S. C.*, 13 Ves. 6; *Lloyd* v. *Williams*, 1 Madd. 466; *Fenner* v. *Taylor*, 1 Sim. 169, 171; *Baker* v. *Bayldon*, 8 Hare, 210: *Secus*, where there is an *agreement* by the husband for a settlement: *Fenner* v. *Taylor*, 1 Sim. 169: or where the interest is reversionary, in part vested and in part contingent: *Wade* v. *Saunders*, 1 Turn. & R. 306. See *ante*, p. 645, note (*y*). Where a wife established her right to a settlement, as against her husband's assignees, to the extent of one-half of the fund, Lord Langdale, M. R., held that she could not afterwards waive the making of the settlement so as to defeat the rights of her children: *Whitten* v. *Sawyer*, 1 Beav. 593.

(*t*) *De la Garde* v. *Lempriere*, 6 Beav. 344, overruling *Steinmetz* v. *Halthin*, 1 Gl. & J. 64; *Wallace* v. *Auldjo*, 1 De G. J. & S. 643.

(*u*) 5 Hare, 149.

the husband, the children were entitled; and that if he was bound, the children were certainly entitled.

Wife's equity obligatory on those claiming from or under husband.

The equity of the wife to oblige her husband to make a suitable provision for herself and children, in consideration of her fortune, is obligatory upon all persons claiming generally from or under him, as executor, trustee in bankruptcy, or assignees by deed in trust to pay debts: So that if the husband becomes a bankrupt, or assigns his property to trustees for the benefit of his creditors, including the interest of his wife, the trustee in bankruptcy or assignees under the deed of assignment will be obliged to make provision for her and her children, before they are permitted to receive it, whether the legacy be absolute or for life only (*x*): or the Court, in its discretion, may order the whole of the fund to be settled (*y*).

It must here be remarked, that an executor *may* pay a wife's legacy to her husband, which will defeat her right to a settlement; but if there be a suit pending, the executor cannot make the payment, because his office is suspended (*z*). But he is always justified in refusing to pay over the wife's fund to the husband, even at her request, and insisting on giving her an opportunity of asserting her equity to a settlement (*a*).

Where the wife is a subject of a foreign state.

When the wife is the subject of a foreign state, by the law of which her husband would be entitled to receive the whole of her property, without making any provision for her, the Court will dispense with her consent, and order the fund to be paid to her husband, without requiring any settlement (*b*).

(*x*) *Carr* v. *Taylor*, 10 Ves. 574; *Beresford* v. *Hobson*, 1 Madd. 362; *Green* v. *Otte*, 1 Sim. & Stu. 250; *Ex parte O'Ferrall*, 1 Gl. & Jam. 347; 1 Rop. Leg. 774, 3rd edit.; *Wilkinson* v. *Charlesworth*, 10 Beav. 324; *Taunton* v. *Morris*, 11 C. D. 779.

(*y*) *Ante*, p. 1155, note (*d*), and the cases there cited. So the wife's equity will prevail against a purchaser from the husband for a valuable consideration, if she takes an absolute interest in the fund: *Scott* v. *Spashett*, 3 Mac. & G. 589: *Secus*, if she has only a life interest: *Tidd* v. *Lister*, 10 Hare, 141; *Re Duffy's Trust*, 28 Beav. 386. See also *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 271. See also *Roberts* v. *Cooper*, [1891] 2 Ch. 335, in which case, however, the wife's conduct was held to bar her equity. As to what amounts to a reduction into possession sufficient to exclude the wife's equity, see *Ex parte Norton*, 8 De G. M. & G. 258; *Allday* v. *Fletcher*, 1 De G. & J. 82.

(*z*) *Murray* v. *Lord Elibank*, 10 Ves. 90. As to the exercise of powers by executors and trustees after administration decree, see *post*, p. 1446.

(*a*) *Re Swan*, 2 Hemm. & M. 34.

(*b*) *Sawer* v. *Shute*, 1 Anst. 63; *Campbell* v. *French*, 3 Ves. 323; 1 Rop. Husb. & Wife, 265, 2nd edit.

A difficulty may occur with respect to the payment of legacies, in cases where a legacy is given to a legatee who has been abroad, and not heard of for a long time. Where the legatee is abroad.

In one case, a legatee having been abroad twenty-eight years, and not heard of for twenty-seven, the Court presumed him to be dead (*c*). And the same was done in a subsequent case (*d*), after an absence, without any tidings, of sixteen years.

But in some cases the Court has required that the parties entitled to the legacies in the event of the death of the legatees should give security to refund, in case the legatee should return (*e*).

However, the executor may avoid all responsibility by pursuing the provisions of the Trustee Act, 1893 (*f*).

An executor who receives notice that a legatee has charged his legacy is bound to withhold all further payment to him; and the executor can create no new charges or rights of set-off after that time (*g*). Where legacy has been assigned.

Where the legatee is a convict felon, a legacy becoming payable to him during the term of his penal servitude, by virtue of the provisions of sects. 9 and 10 of the stat. 33 & 34 Vict. Where the legatee is a convict felon.

S. P., where the husband and wife are domiciled in Scotland: *McCormick* v. *Garnett*, 5 De G. M. & G. 278. See also *Re Marsland*, 55 L. J. Ch. 581, where husband and wife were domiciled in the Isle of Man.

(*c*) *Dixon* v. *Dixon*, 3 Bro. C. C. 510. See also *In the Goods of Hatton*, 1 Curt. 595; *Re Lewes's Trust*, L. R. 11 Eq. 236; 6 Ch. 635. See *ante*, p. 234.

(*d*) *Mainwaring* v. *Baxter*, 5 Ves. 458.

(*e*) *Norris* v. *Norris*, Finch, R. 419; *Bailey* v. *Hammond*, 7 Ves. 590; *Dowley* v. *Winfield*, 14 Sim. 277; *Cuthbert* v. *Parrier*, 2 Phil. Ch. C. 199.

(*f*) See sect. 42 of the Act, replacing sect. 32 of the Legacy Duty Act (36 Geo. III. c. 52), *ante*, p. 1139.

(*g*) *Stephens* v. *Venables*, 30 Beav. 625. As to the effect of notice in questions of priority between equitable assignees, see *Ward* v. *Duncombe*, [1893] A. C. 369, where all the authorities were considered by the House of Lords. In *Re Dallas*, [1904] 2 Ch. 385, D. charged his expectant interest in a legacy under the Will of his father, then living, first in 1897 in favour of S., and secondly in 1898 in favour of B. The father died in 1902. D. the sole executor renounced probate. In 1903 administration with the Will annexed was granted, and the following day B. gave notice of his charge to the administratrix, and subsequently G., on becoming aware of the grant, also gave notice; it was held that B. was entitled to priority although S.'s delay was not due to any negligence on his part. A trustee is under no obligation to answer the inquiries of a stranger about to deal with the *cestui que trust*: *Low* v. *Bouverie*, [1891] 3 Ch. 82.

c. 23, vests in the administrator (if any) appointed by the Crown under that Act, who has absolute power to deal therewith, and subject to the provisions of the Act, all property to which the convict is at the time of his conviction, or becomes while subject to the Act, entitled, is to be preserved and held in trust by the administrator, and on the convict ceasing to be subject to the Act, such property reverts to the convict, his heirs, executors, or administrators (*h*). If no administrator be appointed, an interim curator may be appointed, having the same powers as an administrator (*i*). A legacy acquired by a convict while at large under a ticket of leave is not subject to the Act (*k*).

Where a legacy is under 20*l.*, and the legatee is dead.

Where a legatee of a share of residue less than 20*l.* has died and has no legal personal representative, the Court will distribute such sum amongst the next of kin of such residuary legatee, without requiring administration to be taken out (*l*).

SECTION VI.

Of Interest upon Legacies.

Produce of, or interest on, specific legacies:

Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and consequently, from that period, whatever produce accrues upon them, and nothing more or less, belongs to the legatee (*m*). Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator (*n*): And it is immaterial whether the enjoyment of the principal is postponed by the testator or not (*o*).

Accordingly, it would seem, that the specific legatees of cows, mares, or ewes, are entitled to the brood fallen between the death of the testator and the assent of the executor to the legacy: So also as to the wool of sheep shorn, &c. (*p*).

(*h*) Sect. 8.

(*i*) Sects. 21—26.

(*k*) Sect. 30.

(*l*) *Hinings* v. *Hinings*, 2 H. & M. 32. See further, where administration is unnecessary or will be dispensed with in cases of small estates, *ante*, p. 367 *et seq.*

(*m*) *Sleech* v. *Thorington*, 2 Ves. Sen. 563.

(*n*) *Barrington* v. *Tristram*, 6 Ves. 345; *Bristow* v. *Bristow*, 5 Beav. 289; *Clive* v. *Clive*, Kay, 600. See *ante*, p. 1121, for cases where the question arises between the tenant for life and the remainderman; and *ante*, p. 633, as to apportionment.

(*o*) 2 Rop. Leg. 227, 3rd edit.

(*p*) Wentw. Off. Ex. 445, 14th edit.

General legacies in their nature carry interest (*q*); and, as in the case of all other claims with that incident, the interest is to be computed from the time at which the principal is actually due and payable. on general legacies:

If a legacy be brought into Court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the money was brought into Court: But if the money was put out, the legatee shall have the interest which the money put out by the Court yielded (*r*).

In the further consideration of the doctrine of allowing interest on general legacies, the subject may be regarded, First, in cases where the testator has not fixed any time of payment: Secondly, in cases where the time of payment is named by him.

1st. Where no time of payment is fixed: The executor is by law allowed one year from the testator's death to ascertain and settle his affairs: at the end of which time the Court, for the sake of general convenience, presumes the personal estate to have been reduced into possession: Upon that ground, interest is payable from that time unless some other period is fixed by the Will (*s*). Ord. LV. r. 64, of R. S. C., provides that "where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the Will and in that case according to the Will." Interest will not be payable from an earlier date, although there is a direction in the Will to pay the legacy "as soon as possible" (*t*). If, indeed, the legacy is decreed to be a satisfaction of a debt, the Court always allows interest from the death of the testator (*u*). A further exception 1st. Where the testator has fixed no time for payment:

(*q*) A legacy of 50*l.* for a ring, is not specific (see *ante*, p. 914), and therefore carries interest with other pecuniary legacies: *Apreece* v. *Apreece*, 1 V. & B. 364.

(*r*) *Maxwell* v. *Wettenhall*, 2 P. Wms. 27. But now in most cases money lodged in Court is placed on deposit and bears interest at 2 per cent. See Supreme Court Funds Rules, 1894, r. 76.

(*s*) *Wood* v. *Penoyre*, 13 Ves. 333, 334. See also *Gibson* v. *Bott*, 7 Ves. 96.

(*t*) *Webster* v. *Hale*, 8 Ves. 410, 413; *Benson* v. *Maude*, 6 Madd. 15.

(*u*) *Clarke* v. *Sewell*, 3 Atk. 99. So where the testator charged his

to the rule exists in the case of a legacy given to a child by a parent, or one *in loco parentis* (*x*), whether by way of portion or not; in which instance the Court will give interest *from the death*, to create a provision for its maintenance (*y*): So where a testator bequeaths a sum of money to an infant, and directs that his maintenance shall be paid out of the interest of that sum, the payment of interest will be allowed from the death and not be postponed till the end of one year after (*z*). In *Pickwick* v. *Gibbes* (*a*), a testator directed his trustees, as soon as convenient after the decease of his wife, to raise 10,000*l.* for his nephew, an infant, and to invest it and apply the income towards his maintenance: The testator had previously given his wife an annuity of 1,000*l.* a year payable quarterly: The wife predeceased the testator: And Lord Langdale, M. R., held that the infant was entitled to interest on his legacy, from the testator's decease. In *Lowndes* v. *Lowndes* (*b*), the Court of Exchequer decided that illegitimate children are not within the general exception of a legacy given by a parent to a child. But in *Newman* v. *Bateson* (*c*), where a legacy was given to a natural daughter of the testator, with directions that so much of the interest should be applied in her maintenance as his executors should think proper, the Court held, that although the daughter was a natural child yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child; and directed interest from the time of the testator's death (*d*). This exception, however, is confined to legacies in favour of infants, and has never been extended to a legacy given to an adult (*e*). Nor does it apply to the case of a wife (*f*).

real estate by Will with the simple contract debts of another person, he was considered as having adopted those debts as his own, and the creditors, as legatees, were held entitled to interest from his death: *Shirt* v. *Westby*, 16 Ves. 393.

(*x*) *Wilson* v. *Maddison*, 2 Y. & C. Ch. C. 372. As to what persons stand *in loco parentis*, see *ante*, p. 1076.

(*y*) *Beckford* v. *Tobin*, 1 Ves. Sen. 310; *Crickett* v. *Dolby*, 3 Ves. 13.

(*z*) *Re Richards*, L. R. 8 Eq. 119.

(*a*) 1 Beav. 271.

(*b*) 15 Ves. 301.

(*c*) 3 Swanst. 689.

(*d*) See also *Dowling* v. *Tyrell*, 2 Russ. & M. 343; Acc.

(*e*) *Raven* v. *Waite*, 1 Swanst. 553; *Wall* v. *Wall*, 15 Sim. 513.

(*f*) *Stent* v. *Robinson*, 12 Ves. 461; *Re Whittaker*, 21 C. D. 657. A legacy to the testator's wife, in lieu of dower and freebench, carries interest only from the expiration of a year from the testator's death: *Re Bignold*, 45 C. D. 496.

After the expiration of the year from the death of the testator, the legacy will carry interest, although payment be, from the condition of the estate, impracticable (*g*), and although the assets have been unproductive (*h*): The general rule was stated by Lord Redesdale, in *Pearson* v. *Pearson* (*i*): "Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies; I remember a case of *Greening* v. *Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death; and the Court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months, all the intermediate profits belong to the residuary legatee: The executor may pay the legacy within the twelve months, but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest: But if he has assets, he is to pay interest from the end of the twelve months, whether the assets have been productive or not."

Where a legacy was given to A., to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator, it was held that B. was entitled to interest on the legacy from the

(*g*) *Wood* v. *Penoyre*, 13 Ves. 334. A testator gave a legacy to his daughter, and all his real and personal estate to his wife, and after her death, he gave his real estate, subject to the legacy to his son in fee: The wife survived the testator, and afterwards died: And Sir L. Shadwell, V.-C., held that the legacy, with interest from the end of a year after the testator's death, was raiseable out of the real estate, in case the personal estate was deficient: *Freeman* v. *Simpson*, 6 Sim. 75. See also *Milltown* v. *Trench*, 4 Cl. & Fin. 276; *S. C.*, 10 Bligh, N. S. 1.

(*h*) So it has been held that if a legacy be given to A., subject to the payment of a minor sum to B., interest on such minor sum is payable by A. to B. from the end of a year after the testator's death, notwithstanding that, in consequence of litigation between A. and the residuary legatees, A. did not, for several years, obtain possession of his own legacy, which did not, in the meanwhile, make interest: *Hertford* v. *Lowther*, 9 Beav. 266. See also *Fisher* v. *Brierley*, 30 Beav. 268. See also *Re Blackford*, 27 C. D. 676 (*post*, p. 1660), where the property consisted mainly of a reversionary interest.

(*i*) 1 Sch. & Lef. 10.

death of A.; for although it was objected that, this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held, that the year's time must be intended to be from the death of the testator (*k*).

Interest on annuities:

An annuity bestowed by Will, without mentioning any time of payment, is considered as commencing from the death of the testator, and the first payment as due at the expiration of one year (*l*): from which latter period interest may be claimed in cases where it is allowed at all. But, generally speaking, the Court of Chancery has refused application for interest upon the arrears of annuities given by Will (*m*): unless in cases where the person charged with the payment of the annuity has at law incurred a forfeiture by non-payment, against which he is obliged to seek relief in equity: there no assistance will be given him by the Court, except upon terms of doing equity, viz.: by consenting to pay the grantee of the annuity the arrears due, with interest (*n*).

Interest on bequests for life:

The question, whether a legatee for life is entitled to interest from the death of the testator, or from the end of the year after his death, has been considered in a previous section (*o*).

Where a legacy is charged on real property, and no day of payment is mentioned in the Will, interest will be given from the testator's death (*p*); but where a legacy is payable out of the proceeds of sale of real estate, it was held by Jessel, M. R., that interest was payable from a year after the testator's death (*q*).

2ndly. When the time of payment is fixed:

2. With respect to interest on general legacies, where the time of payment is fixed by the testator: The general rule

(*k*) *Laundy* v. *Williams*, 2 P. Wms. 481. As to a vested legacy to an infant, subject to be divested, see *post*, p. 1169.

(*l*) See *ante*, p. 1116.

(*m*) *Torre* v. *Browne*, 5 H. L. C. 555; *Booth* v. *Coulton*, 2 Giff. 514.

(*n*) *Ferrers* v. *Ferrers*, Cas. temp. Talb. 2; 2 Rop. Leg. 309, 3rd edit. Other cases where the Court has allowed interest on arrears have been where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the payment of interest, or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay: *Torre* v. *Browne*, 5 H. L. C. 578.

(*o*) *Ante*, p. 1117 *et seq.*

(*p*) *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *Spinway* v. *Glynn*, 9 Ves. 483.

(*q*) *Turner* v. *Buck*, L. R. 18 Eq. 301. Cf. *Re Waters*, 42 C. D. 517, where the trust for sale was after the death of the tenant for life, and it was held that the legacy carried interest from the death.

is, that the legacies will not carry interest before the arrival of the appointed period: as, for instance, when the legatee shall attain twenty-one (*r*): Nor will it make any difference that the legacy is vested (*s*).

Where, however, a fund is severed immediately from a testator's death for the benefit of the objects of the gift (*t*), not only is the gift vested (*u*), but carries the interim income, though the only gift is in a direction to pay at a future time (*x*).

(*r*) *Heath* v. *Perry*, 3 Atk. 101; *Tyrrell* v. *Tyrrell*, 4 Ves. 1. Interest is payable only from the time the legacy is receivable: *Earle* v. *Bellingham*, 24 Beav. 448. But if the appointed period (*e.g.*, the legatee's attaining twenty-one or marrying with consent) arrived in the lifetime of the testator, the legacy will carry interest from his death: *Coventry* v. *Higgins*, 14 Sim. 30.

(*s*) *Heath* v. *Perry*, 3 Atk. 102, by Lord Hardwicke; *Crickett* v. *Dolby*, 3 Ves. 10; *Festing* v. *Allen*, 5 Hare, 575, 577. Where a testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience, Alderson, B., held that the legatees were not entitled to interest on their legacies before the expiration of the three years: *Thomas* v. *Att.-Gen.*, 2 Y. & C. 525. See also *Lord* v. *Lord*, L. R. 2 Ch. 782. But where there was a direction to invest the legacies within seven years of the testator's death, and such direction was for the convenience of the estate, and not for the benefit of the residuary legatee, it was held that as the estate was sufficient to pay them at the testator's death, interest must be paid from the end of a year after: *Varley* v. *Winn*, 2 K. & J. 700. In *Olive* v. *Westerman*, 53 L. J. Ch. 525, there was a direction to pay legacies within four years; the legacies remained unpaid by reason of the inability of the legatees, being infants, to give receipts, and not for the convenient administration of the estate: It was held that the unpaid legacies carried interest from the expiration of a year from the death of the testator.

(*t*) That is to say, severed by direction of the testator: thus Cotton, L. J., in *Re Dickson*, 29 C. D. 331, 336, says, speaking of what sums can properly be said to be held by trustees in trust for an infant, "As to each of these sums I should say it did not come within that description, because it was not set apart by the direction of the testator so as to be held by these trustees for the benefit of the infant, but was only retained by the trustees to enable them to comply with the directions in the Will if and when the infant attained twenty-one." See also *Re Inman*, [1893] 3 Ch. 518; *Re Judkins' Trusts*, 25 C. D. 743; *Re Medlock*, 55 L. J. Ch. 738; *Festing* v. *Allen*, 5 Ha. 573; *Re Clements*, [1894] 1 Ch. 665; *Re Woodin*, [1895] 2 Ch. 309.

(*u*) See *ante*, p. 986.

(*x*) *Dundas* v. *Wolfe Murray*, 1 Hemm. & M. 425; *Re Inman*, *ubi sup.*; *Re Smith*, 71 L. T. 318.

legacies to children of testator:

Again, as we have seen (*y*), this rule is subject to an exception in case of the testator being the parent (or *in loco parentis*) (*z*) of the legatee: For there, whether the legacy be vested or contingent, if the legatee be not an adult (*a*), interest on the legacy shall be allowed, as a maintenance, from the time of the death of the testator (*b*), *if there is no other provision for that purpose* (*c*). The Court will determine the *quantum* of allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances (*d*).

Where the legatee is the child of the testator, and a specific sum is given by the Will for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy (*e*). But the Court has in some cases increased the allowance, where it was insufficient for a reasonable maintenance, and where the legacy was vested (*f*); or, where maintenance has been given up to a particular date or the happening of a particular event during infancy, has allowed interest on a legacy for maintenance in the interval between that date and majority (*g*).

Where an infant is entitled to maintenance out of one or other of two contingent legacies, the Court will select that which will be most for the benefit of the infant, and declare

(*y*) *Ante*, p. 1164.

(*z*) *Acherley* v. *Vernon*, 1 P. Wms. 783; *Hill* v. *Hill*, 3 V. & B. 183; *Mills* v. *Robarts*, 1 Russ. & M. 555; *Leslie* v. *Leslie*, Cas. Temp. Sugd. 4; *Rogers* v. *Soutten*, 2 Keen, 598; *Wilson* v. *Maddison*, 2 Y. & C. Ch. C. 372; *Russell* v. *Dickson*, 2 Dr. & War. 133.

(*a*) *Raven* v. *Waite*, 1 Swanst. 553; *Wall* v. *Wall*, 15 Sim. 513.

(*b*) *Harvey* v. *Harvey*, 2 P. Wms. 21; *Incledon* v. *Northcote*, 3 Atk. 438; *Chambers* v. *Goldwin*, 11 Ves. 2; *Brown* v. *Temperley*, 3 Russ. Chanc. Cas. 262; *Martin* v. *Martin*, L. R. 1 Eq. 369. Even though the Will should contain an express direction that the interest shall accumulate: *Mole* v. *Mole*, 1 Dick. 310; *M'Dermott* v. *Kealey*, 3 Russ. Ch. Cas. 264, note. In the case of a child *in ventre sa mère*, interest must be computed from the time of its birth: *Rawlins* v. *Rawlins*, 2 Cox, 425.

(*c*) *Wynch* v. *Wynch*, 1 Cox, 433; *Donovan* v. *Needham*, 9 Beav. 164; *Rudge* v. *Winnall*, 12 Beav. 357; *Re Rouse's Estate*, 9 Hare, 649.

(*d*) 2 Rop. Leg. 234, 3rd edit.

(*e*) *Hearle* v. *Greenbank*, 3 Atk. 716; *Long* v. *Long*, 3 Ves. 286, note; *Ellis* v. *Ellis*, 1 Sch. & Lef. 1; *Re George*, 5 C. D. 837. See p. 1147.

(*f*) *Aynsworth* v. *Pratchett*, 13 Ves. 321; 2 Rop. Leg. 238, 3rd edit. See *Turner* v. *Turner*, 4 Sim. 430.

(*g*) *Chambers* v. *Goldwin*, 11 Ves. 2; *Martin* v. *Martin*, L. R. 1 Eq. 369.

that interest at 4 per cent. is payable upon it, to be applied for his maintenance (*h*).

This exception is not extended in favour of nephews and nieces (*i*), nor of grandchildren (*k*) unless the testator were *in loco parentis.*

apparent intent that the legatees shall be maintained out of the bequest:

Again, in some instances, legacies payable at a future period will carry interest, although not given by a parent, or a person *in loco parentis*, where there appears an intention on the part of the testator that the legatees shall be maintained out of the property bequeathed to them (*l*). In *Boddy* v. *Dawes* (*m*), a testator gave legacies out of a sum of stock to the grandchildren named in his Will on their attaining the age of twenty-one, and if any of them should die under twenty-one their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned: And Lord Langdale, M. R., held, that the grandchildren were entitled to the interest during their minority.

legacy given "with interest."

Where the payment of a legacy is postponed by the testator to a future period, as until the legatee attains twenty-one, and the Will directs, that when that period arrives, the payment shall be made *with interest*, the legacy will bear interest only from the end of the year after the testator's death (*n*).

Interest of legacy during lifetime of infant legatee whose death under age divests the legacy.

Where a vested legacy, either particular or residuary, is given to an infant, without appointing any time for payment, and it is subject to a limitation over upon a divesting contingency, which takes effect; as where the legacy is given upon condition to divest it upon the death of the legatee under twenty-one, and he dies under that age: yet as the legacy was payable at the end of the year after the testator's death, the executor or adminis-

(*h*) *Martin* v. *Martin*, L. R. 1 Eq. 369; and see *ante*, p. 1151.

(*i*) *Crickett* v. *Dolby*, 3 Ves. 10.

(*k*) *Haughton* v. *Harrison*, 2 Atk. 330; *Butler* v. *Freeman*, 3 Atk. 58; *Descrambes* v. *Tomkins*, 4 Bro. C. C. 149, note; *S. C.*, 1 Cox, 133; *Festing* v. *Allen*, 5 Hare, 579.

(*l*) *Leslie* v. *Leslie*, Cas. temp. Sugd. 1.

(*m*) 1 Keen, 362.

(*n*) *Knight* v. *Knight*, 2 Sim. & Stu. 792.

trator of the infant legatee, and not the legatee over, will be entitled to the interest which accrued on the legacy during the infant legatee's life (*o*).

The same doctrine prevails with respect to a gift of a *residue*, where the bequest is such as to *vest* immediately, but not *payable* until the legatee shall attain twenty-one, with a bequest over, divesting the legacy in case he dies under that age: In that case also, although the legatee dies under twenty-one, his personal representative will be entitled to the interest which became due during the legatee's life (*p*).

The rule is otherwise with respect to contingent bequests (*q*), except in those cases where the infant is entitled to maintenance out of the income of a contingent legacy, either by reason of the testator being the father of or standing *in loco parentis* towards the infant or by reason of the infant being one of a class. So where a *particular* legacy, though vested, is not payable till twenty-one, and nothing is said in the Will that shows the testator's intention to give interest in the meantime, in such case, if the legacy be divested by the death of the legatee before attaining twenty-one, his personal representatives cannot claim the interest accruing till his death (*r*).

But where a particular legacy is given, even contingent upon the event of the legatee attaining twenty-one, with *interest in the meantime*, and the legatee dies before that age, the arrears of interest up to the time of his death will, it seems, belong to his personal representatives (*s*).

(*o*) *Taylor* v. *Johnson*, 2 P. Wms. 504; *Shepherd* v. *Ingram*, Ambl. 448; *Montgomerie* v. *Woodley*, 5 Ves. 522; 3 Atk. 102, note by Sanders to *Heath* v. *Perry*; *Branstrom* v. *Wilkinson*, 7 Ves. 420; *Mills* v. *Robarts*, 1 Russ. & M. 555; *M'Donald* v. *Bryce*, 2 Keen, 284; *Barber* v. *Barber*, 3 Mylne & Cr. 688. See also *Webb* v. *Kelly*, 9 Sim. 469; *Re Buckley's Trusts*, 22 C. D. 583.

(*p*) *Nicholls* v. *Osborn*, 2 P. Wms. 419; *Chaworth* v. *Hooper*, 1 Bro. C. C. 81; *Hawkins* v. *Combe*, 1 Bro. C. C. 335; *Re Smith*, 42 C. D. 302. And see *Skey* v. *Barnes*, 3 Meriv. 345, 346, *per* Sir W. Grant.

(*q*) See Cox's note to *Taylor* v. *Johnson*, 2 P. Wms. 506. See also *Descrambes* v. *Tomkins*, 1 Cox, 133; *S. C.*, 4 Bro. C. C. 149, *in notis*; *Glanvill* v. *Glanvill*, 2 Meriv. 38; *Thruston* v. *Anstey*, 27 Beav. 337, *per* Wood, V.-C.; *Re Inman*, [1893] 3 Ch. 518.

(*r*) See Mr. Sanders's note to *Heath* v. *Perry*, 3 Atk. 102, and that of Mr. Cox to *Taylor* v. *Johnson*, 2 P. Wms. 506.

(*s*) *Harris* v. *Finch*, M'Clel. 141: but see *Errington* v. *Chapman*, 12 Ves. 20.

A legacy given to an infant as executor is payable only on his accepting the office and duties of executor; such a legacy will not therefore carry interest from the testator's death, since the legatee cannot accept the office until he attains twenty-one (*t*). Legacy to an infant as executor.

It remains to consider the rate of interest allowed on legacies: The rule at present established is to allow 4 per cent., whether the legacy be charged upon land, or payable out of personal estate only, unless the Will directs otherwise (*u*). Nor will the rule be varied, it should seem, in the Courts here, by reference to the higher rate of interest allowed in the country where the testator was domiciled, or where the fund was invested at the time of making the Will. The English Court having the administration of the property comprised in the English Will must administer the estate according to the rules of English law. Therefore, although the testator is domiciled in France, the interest payable on legacies given by his Will is governed by the law of the country in which the estate is being administered (*x*). So also a legacy by a testator domiciled in Antigua will not, in an English Court, be allowed to bear Antigua interest (*y*): So if a legacy is given in the currency of Jamaica, where the testator resided, and there are assets and executors in both countries, the legatee shall be allowed interest at 4 per cent. only, and not Jamaica interest, in a suit in an English Court against the English executor (*z*). The principle is, that the fund is supposed in the course of a year after the testator's death to come into the hands of the executor, and that the executor can make 4 per cent. of it here. If it were proved that the fund was abroad, and greater interest made, it might be otherwise (*a*). Rate of interest.

But interest has been directed to be computed, as against the executor, at 5 per cent., when the property has been employed by him in trade (*b*). Generally, an executor im-

(*t*) *Re Gardner*, 67 L. T. 552.

(*u*) R. S. C. 1883, Ord. LV. r. 64.

(*x*) *Hamilton* v. *Dallas*, 38 L. T. 215. But cf. *Re Fitzgerald*, [1903] 1 Ch. 933; [1904] 1 Ch. 573 (C. A.).

(*y*) *Malcolm* v. *Martin*, 3 Bro. C. C. 50. See also *Stapleton* v. *Conway*, 1 Ves. Sen. 427. The case of *Raymond* v. *Brodbelt*, 5 Ves. 199, was decided on its particular circumstances: By Sir W. Grant, in *Bourke* v. *Ricketts*, 10 Ves. 334.

(*z*) *Bourke* v. *Ricketts*, 10 Ves. 330.

(*a*) *Malcolm* v. *Martin*, 3 Bro. C. C. 54, by Lord Alvanley.

(*b*) *Heathcote* v. *Hulme*, 1 Jac. &

properly retaining balances is charged with interest at 4 per cent., but if, in addition, he commits a breach of trust or changes money from a proper to an improper state of investment, he is charged 5 per cent. If he employ the trust money in trade, he will be charged either with the profits or 5 per cent. compound interest (*c*). So in a case where an executor was directed to lay out the testator's personalty in the funds, and he unnecessarily sold out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands, he was charged with 5 per cent. interest and costs (*d*). And in a case where trustees and executors after payment of a testator's debts kept the balance of the personal estate at their bankers, the Court charged them with interest on the balance at 5 per cent. from the date of the payment of the debts (*e*).

Simple interest except under particular circumstances.

The interest on legacies is to be computed upon the principal only, and not upon the principal and interest (*f*). But under particular circumstances, the Court will allow the legatee compound interest: As where there is an express direction in the Will that the executor should lay out the fund to accumulate, and he neglects to do so (*g*).

In a case where the testator gave to each of certain infant nephews and nieces by name, a sum of money "with compound interest at 5 per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen;" it was held by Sir C. Pepys, M. R., that compound interest at 5 per cent. was to run on each of the legacies from the birthdays of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death (*h*).

Walk. 122; *Williams* v. *Powell*, 15 Beav. 461; *post*, pp. 1491, 1492. See also *Burnell* v. *Brown*, 1 Jac. & Walk. 175, as to the interest where the property is wrongfully withheld.

(*c*) *Jones* v. *Foxall*, 15 Beav. 388.

(*d*) *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586. See also *Mosley* v. *Ward*, 11 Ves. 581; *Knott* v. *Cottee*, 16 Beav. 77; *post*, p. 1492 *et seq.* But in *Re Barclay*, [1899] 1 Ch. 674, where the executor simply retained moneys which he ought to have invested, he was charged with interest at the rate of 3 per cent. instead of 4 per cent., as being the present practice in such cases.

(*e*) *Re Jones*, 49 L. T. N. S. 91.

(*f*) *Perkyns* v. *Baynton*, 1 Bro. C. C. 574; *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586.

(*g*) *Raphael* v. *Boehm*, 11 Ves. 92; *S. C.*, 13 Ves. 590; *Dornford* v. *Dornford*, 12 Ves. 127; *Jones* v. *Foxall*, 15 Beav. 388, 461; *Knott* v. *Cottee*, 16 Beav. 77. See *post*, p. 1495 *et seq.*

(*h*) *Arnold* v. *Arnold*, 2 M. & K. 365.

SECTION VII.

In what currency Legacies are to be paid.

Upon this subject the intention of the testator, as apparent upon the construction of the Will, is to furnish the rule of decision (*i*). But where legacies are given generally, it will be presumed that the testator intended that they should be paid in the money of the country in which he was domiciled and the Will was made; without regard to the currency of the place where the legatees reside (*k*).

So if a testator, domiciled in England, charges his lands abroad, with legacies generally, without mentioning whether they are to be paid in sterling money or in currency, they will be payable in sterling money of England (*l*).

Where a legacy is given in a foreign country and coin, as in Sicca rupees, by a Will of a testator domiciled in India, the payment, if made by remittance to this country, must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance: So as to other countries (*m*).

In *Campbell* v. *Graham* (*n*), a testator, domiciled in Jamaica, gave legacies in Jamaica currency, which ultimately came to be paid out of assets in England: And Sir J. Leach, M. R., held, that as there could be no expense of remittance, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate at the time of payment.

In *Holmes* v. *Holmes* (*o*), a testator, being then domiciled in Ireland, by his Will made there prior to the stat. 6 Geo. IV.

(*i*) *Lansdowne* v. *Lansdowne*, 2 Bligh, 91; *Yates* v. *Maddan*, 16 Sim. 613.

(*k*) *Saunders* v. *Drake*, 2 Atk. 466; *Pierson* v. *Garnet*, 2 Bro. C. C. 38; *Malcolm* v. *Martin*, 3 Bro. C. C. 50; *Lansdowne* v. *Lansdowne*, 2 Bligh, 92; *Yates* v. *Maddan*, 16 Sim. 613.

(*l*) *Phipps* v. *Lord Anglesea*, 5 Vin. Abr. 209, pl. 8; *S. C.*, 1 P. Wms. 696; *Wallis* v. *Brightwell*, 2 P. Wms. 88, 89; *Lansdowne* v. *Lansdowne*, 2 Bligh, 91, by Lord Eldon. See also *Noel* v. *Rochfort*, 10 Bligh, 483; *S. C.*, 4 Cl. & F. 158.

(*m*) *Cockerell* v. *Barber*, 16 Ves. 461. See *Scott* v. *Bevan*, 2 B. & A. 78; *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581.

(*n*) 1 Russ. & M. 453.

(*o*) 1 Russ. & M. 660.

c. 79 (equalizing the currency of the United Kingdom), bequeathed an annuity: He afterwards transferred his residence to England, and died domiciled there, after the passing of that statute: And it was held by Sir John Leach, M. R., that the bequest of the annuity, though not perfected till the death of the testator, was a gift made at the time of making the Will; and, the gift being prior to the statute, that the annuity was to be computed in Irish currency.

In *Banks* v. *Sladen* (*p*), a testator gave a legacy of 12,500*l.* 4 per cent. annuities: At the making of his Will there was a stock called New 4 per cents., in which he had a small sum, and a stock called 4 per cents. consolidated, of which he was a holder to a very large amount: Before the death of the testator, the latter stock was reduced to 3½ per cent.; and another 4 per cent. stock was created: and Sir J. Leach, M. R., held that the investment of the legacy was to be made in an existing 4 per cent. stock, and not in the stock which had been reduced to 3½ per cent.

In *Sheffield* v. *Lord Coventry* (*q*), a testator gave to a son a legacy of 20,000*l.* in "the joint stock of the 4 per cent. Bank Annuities, transferable at the Bank of England, commonly called 4 per cent. Bank Annuities:" The only 4 per cent. Bank Annuities existing at the date of his Will were reduced to 3½ per cent.; and afterwards, and before his death, a new stock of 4 per cent. Bank Annuities was created: And the same learned judge held, that the Will spoke at the testator's death, and the son was entitled to a sum of 20,000*l.* in the then existing 4 per cent. Bank Annuities.

SECTION VIII.

Of the Payment or Delivery of Specific Legacies.

Whether the legatee is entitled to any increase which accrued before the death of the testator:

With respect to the payment, or delivery, of specific legacies, a question may arise, whether the legatee is entitled to any increase, which may have happened to the subject, between the date of the Will and the death of the testator: or, in other words, whether the legacy shall have relation to the one period or the other.

(*p*) 1 Russ. & M. 216. (*q*) 2 Russ. & M. 317.

i.e. whether the legacy shall relate to the date of the Will or death of testator:

As to Wills made, or re-executed, or republished on or after the 1st day of January, 1838, it is enacted by stat. 1 Vict. c. 26, s. 24, that "every Will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will."

The general rule, which was established, as to Wills of personal estate, before the passing of this statute, may, perhaps, be stated to be, that, in order to confine the bequest to the date of the Will, the expressions must refer unequivocally to the property which the testator then had; otherwise they would not be allowed to have that effect (*r*): Thus if the bequest were general, as of all the testator's goods *in* a particular house or place, whatever personal chattels were found there at the time of his death would pass, though not there at the date of the Will (*s*).

However, if the testator showed a clear intention to dispose of such goods as belonged to him in a particular place at the date of his Will, property afterwards brought there would not pass: as where the bequest is "of all such part of my personal property as is now in my house at ——" (*t*). But in *All Souls College* v. *Coddrington* (*u*), the bequest was, "I devise my library of books, now in the custody of C., to All Souls College in Oxford;" and the testator gave to the same college 4,000*l.* more to augment their library: He afterwards bought several valuable books, which were placed in his library: And the question was,

(*r*) See *Parker* v. *Marchant*, 1 Y. & C. Ch. C. 290. See also the rule as stated by Lord Cottenham, in *Cole* v. *Scott*, 1 Mac. & G. 529, *ante*, p. 151, note (*f*).

(*s*) *Sayer* v. *Sayer*, 2 Vern. 688; 1 Rop. Leg. 220, 3rd edit. But none will pass by such a bequest, which are not *actually* in the house or place at the testator's death, however clear the intention of the testator may be to have placed them there: Thus if one bequeaths to his son the furniture of his house at D., and orders goods to be carried thither from London, and agrees with the carrier for that purpose, but dies before the goods are removed to D.; they cannot pass by the bequest: *Beaufort* v. *Dundonald*, 2 Vern. 739.

(*t*) 1 Rop. Leg. 220, 3rd edit.; *Dormer* v. *Burnet*, cited in *Downing* v. *Townsend*, Ambl. 281; *Att.-Gen.* v. *Bury*, 2 Vin. Abr. 328, pl. 2; 1 Eq. Cas. Abr. 201. See also *Smallman* v. *Goolden*, 1 Cox, 329. As to the effect of the word "now" in a Will to which the Wills Act applies, see *ante*, p. 151, note (*f*).

(*u*) 1 P. Wms. 597.

whether those books passed to the College: Sir Joseph Jekyll, M. R., determined in the affirmative, upon the construction of the word "now;" his Honour being of opinion that "now" did not relate to the books which were in the library at the date of the Will; but that it denoted where the library was; and might have been intended to distinguish that particular library from any other belonging to the testator: And his Honour observed, "if I devise all my flock of sheep now on such a hill, or in such a pasture; in that case, because sheep are in their nature fluctuating, some must die, some be killed and some lambs be produced which will afterwards breed, and it being the case of a collective body, the sheep produced afterwards shall pass; and this is within the reason of a devise of a personal estate, which, because always fluctuating, shall therefore relate to the time of the testator's death; besides the Will, as to personals, does not speak till after the testator's death."

case of accretion:

In *Harcourt* v. *Morgan* (*x*), a testator gave to W. H. and M. H. the amount of the bond he held for 1,000*l.*: when they got the principal money paid to them, they then to give their uncle, J. B., the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond: And Lord Langdale, M. R., held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal (*y*).

With respect to cases where the testator has bequeathed the whole of some one *genus* of his property, as "all debts due to me on bonds," or "all my stock," or "my share," or in any other way has referred to particular property, and bequeathed it by the description of all *his* property, the Court had arrived at a conclusion, before the Wills Act, that he meant only so much of the property in that state of investment as he was possessed of at the date of his Will (*z*). But in *Goodlad* v. *Burnett* (*a*), Sir W. Page Wood, V.-C., expressed his opinion that, since the above enactment of the Wills Act, it required some plainer indication of "contrary intention," than the mere circumstance that the testator has described stock by the words "*my* stock," to take the case out of the statutory rule that the Will shall speak

(*x*) 2 Keen, 274.

(*y*) But where the express words of the gift are "300*l.* due upon a bond" they will not be extended further: *Roberts* v. *Kuffin*, 2 Atk. 112; and see *ante*, p. 948, note (*f*).

(*z*) *Douglas* v. *Douglas*, Kay, 400, 404; and see *ante*, p. 914.

(*a*) 1 Kay & J. 341, *ante*, p. 915, note (*l*).

as if it had been executed immediately before his death: And his Honour accordingly held that, where a testatrix, in 1850, bequeathed thus, "I give *my* New three and a quarter per cent. annuities," the bequest comprised all the New three and a quarter per cents. which she had at her death:—And the learned judge distinguished between a reference to a particular thing, such as a ring or a horse, and a bequest of it as "my ring" or "my horse," and a bequest of that which is generic and which may be increased or diminished (*b*).

Effect of sect. 24 of the Wills Act as regards specific legacies.

The effect of sect. 24 of the Wills Act is not to alter the law of specific legacies (*c*). The only effect is that, to ascertain what is comprised in a specific bequest, it is necessary in all cases to consider the Will as made immediately before the testator's death (*d*). There is only one exception to this rule and that is where the testator refers to the date of the Will as the point of time at which the quantum of the property is to be ascertained (*e*). There is, however, another apparent exception to the rule, which is, where a testator has used words of such a character that it is doubtful whether or not they are sufficiently extensive to cover additions to the property made between the date of the Will and that of his death. It is in the construction

(*b*) See also *Douglas* v. *Douglas*, Kay, 400, 405, where the same judge expressed an opinion that under the Wills Act a gift of "all my stock" would pass all stock to which the testator was entitled at his death; but a gift of "all my stock which I have purchased," must be confined to stock actually purchased at the date of the Will: And his Honour took a like distinction between a gift of "all the debts due to me on judgments," and "all judgments, which I have registered:" His Honour proceeded to decide, that in a Will made since the statute, and containing the words, "I hereby exonerate my sister from all claims in respect of money laid out by me in improvements of the estates in Scotland, and which money has, according to the laws of Scotland, been charged thereon," the exoneration only applied to moneys so charged at the date of the Will, and not to money afterwards laid out and charged, nor even to money then laid out, but afterwards charged.

(*c*) *Per* Jessel, M. R.: *Bothamley* v. *Sherson*, L. R. 20 Eq. 304, 312.

(*d*) *Per* Turner, L. J.: *Langdale* v. *Briggs*, 8 De G. M. & G. 391, 435.

(*e*) *Cole* v. *Scott*, 1 Mac. & G. 529; *Douglas* v. *Douglas*, Kay, 400; *Hutchinson* v. *Barrow*, 6 H. & N. 583; *Williams* v. *Owen*, 2 N. R. 585; *Jepson* v. *Key*, 2 H. & C. 873; *Hepburn* v. *Skirving*, 4 Jur. N. S. 651; *Lord Lilford* v. *Powys Keck*, 30 Beav. 300; *Wagstaff* v. *Wagstaff*, L. R. 8 Eq. 229. And see *ante*, pp. 150—154.

of gifts of this character that questions have usually arisen since the Wills Act (*f*).

Bonuses accruing in the testator's life:

(a) after the Will.

(b) before the Will.

If the testator bequeaths to a specific legatee a certain quantity of Bank stock, for example 5,000*l.* standing in his name, and a bonus be given by the Bank, under the statute 56 Geo. III. c. 96, s. 3, in the interval between the date of the Will and the testator's death, the additional capital will not pass to the legatee (*g*). But in *Matthews* v. *Maude* (*h*), a testatrix had power to dispose by Will of property, which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7,000*l.* Bank stock which after the brother's death was increased by a bonus to 8,750*l.* The testatrix in her Will, made shortly after the bonus was declared, described the Bank stock as consisting of 7,000*l.*: And Sir J. Leach, M. R., decreed that the 8,750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother (*i*).

Bonuses accruing after the testator's death.

And with regard to bonuses which accrue after the death of the testator, upon shares specifically bequeathed by him such bonuses belong to the specific legatee (*k*).

Specific legacies not to be sold without necessity:

must be got in by the executor at the expense of the general estate:

It may be observed that it is the duty of executors, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish; and, unless compelled, they ought not to apply them to the payment of debts (*l*). And further, it is also the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise: and that the expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration (*m*).

(*f*) See for cases where the larger interpretation prevailed, *Miles* v. *Miles*, L. R. 1 Eq. 462; *Trinder* v. *Trinder*, *ibid.* 695; *Castle* v. *Fox*, L. R. 11 Eq. 542; *Re Ord*, 9 C. D. 667; 12 C. D. 22; *Saxton* v. *Saxton*, 13 C. D. 359; *Re Champion*, [1893] 1 Ch. 101. And for cases where the narrower, *Webb* v. *Byng*, 1 K. & J. 580; *Re Portal and Lamb*, 30 C. D. 50 (C. A.), reversing Kay, J., 27 C. D. 600. And see generally as to the time from which a Will speaks, *ante*, pp. 150—154, and as to the ademption of legacies, *ante*, p. 1061 *et seq.*

(*g*) *Norris* v. *Harrison*, 2 Madd. 268. See further, *Loscombe* v. *Wintringham*, 12 Beav. 46. But see also *Courtney* v. *Ferrers*, 1 Sim. 145.

(*h*) 1 Russ. & M. 397.

(*i*) See also *Carver* v. *Bowles*, 2 Russ. & M. 304.

(*k*) See *Maclaren* v. *Stainton*, 27 Beav. 460, 462; reversed 3 De G. F. & J. 202. See *ante*, p. 1162.

(*l*) *Clarke* v. *Lord Ormonde*, Jac. 108.

(*m*) *Perry* v. *Meddowcroft*, 4 Beav.

It may be added, that if a testator, dying solvent, bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as for instance if he has twenty horses in his stable and bequeaths six of them, the legatee, and not the executor, has the right of selection (*n*).

right of selection in a legatee of a certain number of a stock of articles.

Where there is a bequest of such of a class of articles as the legatee may select he will be apparently entitled to elect to take the whole (*o*).

If it can be gathered from the words used that a testator intended to give a particular property to a legatee, but owing to his having several properties answering the description in the Will, it is impossible to say, either from the Will itself or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the Court cannot, to avoid an intestacy, construe the Will as giving the legatee the option of electing which property he will take (*p*).

There has already been occasion to point out, that if a testator should happen to direct his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee, unopened, the executor cannot, consistently with his duty, comply with this direction (*q*).

Specific legacy of an unopened packet.

204. As to liability on shares in joint stock companies where the interest of the testator in the subject-matter is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatees and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose. Consequently, specific legatees of shares in a banking company were held liable to pay the calls made subsequent to the testator's death: *Armstrong* v. *Burnet* (1855), 20 Beav. 424, where the earlier cases are considered; and, so far as inconsistent therewith, they must now be considered overruled. See *per* Sir W. Page Wood, V.-C., in *Re Box* (1863), 1 H. & M. 552, 559. See also *Day* v. *Day* (1860), 1 Dr. & Sm. 261. See *post*, p. 1336, as to the exoneration of specific legacies.

(*n*) *Jacques* v. *Chambers*, 2 Coll. 435; *Millard* v. *Bailey*, L. R. 1 Eq. 378; *Tapley* v. *Eagleton*, 12 C. D. 683.

(*o*) *Cooke* v. *Farrand*, 7 Taunt. 121; *Arthur* v. *Mackinnon*, 11 C. D. 385; *Re Sharland* (1896), W. N. 62.

(*p*) *Asten* v. *Asten*, [1894] 3 Ch. 260; *Re Cheadle*, [1900] 2 Ch. 620.

(*q*) See *ante*, p. 303.

SECTION IX.

Of Election.

Although the limits of this Treatise will not admit of a full discussion of the doctrine of Election, it is necessary to state briefly the nature of the subject, and some of the leading principles established with respect to it.

Doctrine of election:

It is a principle of equity, that a person, who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it: If therefore a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy, by the same Will, A. will not be permitted to keep his own estate, and enjoy at the same time the fruits of the devise or bequest made in his favour, but must *elect* whether he will part with his own estate, and accept the provisions of the Will, or continue in the enjoyment of his own property, and reject that bequeathed (*r*).

It is not requisite, for the operation of this principle, that the testator should be aware that the property, of which he so undertakes to dispose, is not his own: The obligation of making an election will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of bequests were absolutely at his own disposal (*s*).

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's; in that case the former, the donee of the testator's property, is

(*r*) The foundation of election is that no one shall claim under and in opposition to the same instrument: Sug. on Powers, 8th ed. 576; cf. *per* Chitty, J., in *Re Chesham*, 31 C. D. at p. 473. See notes to the case of *Dillon* v. *Parker*, 1 Swanst. 396 *et seq.*, and the cases collected in 2 Rop. Leg. 482, *et seq.* 3rd edit. See also *Wollaston* v. *King*, L. R. 8 Eq. 165, 173, *per* James, V.-C., who states the ordinary principle to be, that if a testator gives property, by design or by mistake, which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot take both.

(*s*) *Whistler* v. *Webster*, 2 Ves. 370; *Thellusson* v. *Woodford*, 13 Ves. 221; *Welby* v. *Welby*, 2 Ves. & B. 199; *Naylor* v. *Wetherell*, 4 Sim. 114; *Re Brooksbank*, 34 C. D. 160. When it appears that the testator meant only to dispose of the property provided he had power to do so, no case of election arises: *Church* v. *Kemble*, 5 Sim. 525.

bound to elect whether he will give effect to the disposition of his own estate in favour of the latter. This is not the case where there is no property of the testator given, but he has improperly exercised a power, so that the property will go in default of appointment. As where a testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund amongst his children only; he appointed the estate to some of his children, and the fund to his children and to a grandchild (who was not an object); it was held that this was not a case of election, and that the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power (*t*). The case of an attempt by a testator to dispose of property which belongs to some one else must be distinguished from the case where a testator attempts by Will to exercise a power of appointment and the appointment is *ex facie* void; in which case the Will must be read as if the invalid appointment were not in it, and no case of election arises (*u*).

distinction where no property of the testator is given, but he has merely invalidly exercised a power.

It is necessary, however, that the intention of the testator, to dispose of the property which is not his own, should be clear: the intention must appear by demonstration plain, by necessary implication (*x*). And it would seem that the intention must

Testator's intention must be clear on face of Will.

(*t*) *Re Fowler's Trust*, 27 Beav. 362.

(*u*) *Re Warren's Trusts*, 26 C. D. 208, and compare *Re Brooksbank*, 34 C. D. 160. In *Re Bradshaw*, [1902] 1 Ch. 436, Kekewich, J., held that, in applying the doctrine of election as to taking under or against an instrument, there is no distinction in principle between an appointment which is void because it is in excess of the power and an appointment which is void as transgressing the rule against perpetuity, and that, as in the case of an appointment to a person not an object of a power a case of election is raised, so in the case of an appointment void for remoteness a case of election is raised. But see *Re Oliver's Settlement*, W. N. (1904), p. 194, where *Re Bradshaw* was not followed by Farwell, J. See also *Re Beale's Settlement*, W. N. (1904), p. 206.

(*x*) *Rancliffe* v. *Parkins*, 6 Dow, 179, by Lord Eldon; *Johnson* v. *Telford*, 1 Russ. & M. 244; *Crabb* v. *Crabb*, 1 M. & K. 511; *Dillon* v. *Parker*, in Dom. Proc. 7 Bligh, N. S. 325; *S. C.*, 1 Cl. & F. 303; *Clementson* v. *Gandy*, 1 Keen, 309; *Dummer* v. *Pitcher*, 5 Sim. 35; 2 M. & K. 262. See the cases collected in 2 Rop. Leg. 498 *et seq.*, 3rd edit. See also *Langslow* v. *Langslow*, 21 Beav. 552; *Tomkins* v. *Blane*, 28 Beav. 422; *Honywood* v. *Foster*, 30 Beav. 14; *Re Fowler's Trusts*, 27 Beav. 362; *Maddison* v. *Chapman*, 1 Johns. & H. 470; *Stephens* v. *Stephens*, 3 Drew. 697; 1 De G. & J. 62; *Wintour* v. *Clifton*, 8 De G. M. & G. 641; *Box* v. *Barrett*, L. R. 3 Eq. 244; *Cooper* v.

Parol evidence inadmissible.

appear upon the face of the Will: for it seems now to be established that parol evidence is inadmissible for the purpose of showing it (*y*).

The presumption of general intention may be rebutted by an inconsistent particular intention.

The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument (*z*). The rule of not claiming by one part of an instrument in contradiction to or while refusing to comply with another part, has exceptions; and the ground of exception seems to be a particular intention denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election (*a*). It is on this ground that it has been held, that the doctrine of election does not apply to the case of an interest which a married woman takes with a restraint on anticipation (*b*), whether the question of election is raised upon the face of two clauses in the same instrument (*c*), or whether it is raised by a married woman taking under a different instrument and refusing to comply with some covenant contained in the instrument, under which she takes the property with the restraint on anticipation (*d*), and it appears to be immaterial that pending the distribution of the

Cooper, L. R. 6 Ch. 15; L. R. 7 H. L. 53; *Orrell* v. *Orrell*, L. R. 6 Ch. 302; *Wilkinson* v. *Dent*, L. R. 6 Ch. 339; *Synge* v. *Synge*, L. R. 9 Ch. 128. Where a testator, being part owner of an undivided interest in a particular property, devised that property specifically to his co-owner, it was held that his intention was to devise the entirety and that a case of election arose against his co-owner who took a beneficial interest under the Will. But where the devise is by general words, such as "all my lands and hereditaments," or the like, no case for election arises, because there is other property of the testator's sufficient to satisfy the devise itself: *Padbury* v. *Clark*, 2 Mac. & G. 298; *Fitzsimons* v. *Fitzsimons*, 28 Beav. 417; *Whitley* v. *Whitley*, 31 Beav. 173; *Howells* v. *Jenkins*, 2 Johns. & H. 706; *Miller* v. *Thurgood*, 33 Beav. 496.

(*y*) *Stratton* v. *Best*, 1 Ves. 285; *Doe* v. *Chichester*, 4 Dow, 65, 76, 78, 89; *Clementson* v. *Gandy*, 1 Keen, 309. See the cases, *contra*, collected in the notes to *Dillon* v. *Parker*, 1 Swanst. 402, 403; *Pickersgill* v. *Rodger*, 5 C. D. 163, 171, in which case, however, *Clementson* v. *Gandy* and the other authorities to the same effect were not cited.

(*z*) *Re Vardon's Trusts*, 31 C. D. 275 (C. A.); reversing Kay, J., 28 C. D. 124.

(*a*) 1 Swanst. 404, note.

(*b*) It should be noted that *Willoughby* v. *Middleton*, 2 J. & H. 344, is in effect overruled by *Re Vardon's Trusts*, *ubi supra*.

(*c*) *Re Wheatley*, 27 C. D. 606.

(*d*) *Smith* v. *Lucas*, 18 C. D. 531.

testator's estate in respect of which the question arises the married woman becomes discovert (*e*).

To what cases doctrine of election applicable:

The doctrine of election is applicable to interests immediate, remote, contingent, of value, or not of value (*f*).

Since election arises when a testator disposes of his own property and at the same time affects to dispose of property which belongs to some one else, it follows that the rule as to election is only applicable as between a gift under a Will, and a claim *dehors* the Will and adverse to it, and not as between one clause in a Will and another clause in the same Will (*g*).

The property *dehors* the Will must be such, that the person taking under the Will can give it up or make compensation out of it to those disappointed of the benefits intended for them under the Will; otherwise no case of election or compensation arises. And if a testator purports to devise another man's lands to a person who takes no benefit under the Will, and bequeaths a legacy to another person out of his own estate, the fact that such legatee after the testator's death acquires a title to the lands by purchase or otherwise does not put him to his election (*h*).

Under sect. 33 of the Wills Act a deceased child's estate is in the same position *quoad* the Will as if he had survived the testator, and consequently, as between his estate and disappointed legatees, the latter are entitled to put his estate to election (*i*).

It must, however, be observed, that the doctrine does not preclude a party claiming by the Will from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the Will: Thus a man may be tenant by curtesy of an estate tail held by his wife in opposition to a Will under which he accepts a legacy (*k*).

(*e*) *Haynes* v. *Foster*, [1901] 1 Ch. 361. See, however, *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396, where after divorce a woman brought an action to avoid a covenant in an ante-nuptial settlement made during infancy, and before trial married again, and it was held that the doctrine of election did not apply during the existing coverture to the income she was restrained from anticipating.

(*f*) *Wilson* v. *Townshend*, 2 Ves. 697, by Lord Loughborough; *Webb* v. *Lord Shaftesbury*, 7 Ves. 481.

(*g*) *Wollaston* v. *King*, L. R. 8 Eq. 165; *Wallinger* v. *Wallinger*, L. R. 9 Eq. 301; *Burton* v. *Newbery*, 1 C. D. 234; *Bizzey* v. *Flight*, 3 C. D. 269.

(*h*) *Re Chesham*, 31 C. D. 466, 477.

(*i*) *Pickersgill* v. *Rodger*, 5 C. D. 163.

(*k*) *Cavan* v. *Pulteney*, 2 Ves. 544;

Nor is the doctrine applicable as against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the Will (*l*).

Heir-at-law: Previous to the Wills Act, there were some questions which arose as to whether an heir-at-law was put to his election, which cannot arise in the case of Wills made since that Act. Thus the doctrine of election was not applicable, where real property was assumed to be devised by a Will not executed so as to pass it, and by the same Will a legacy was given to the heir: In such a case the heir might take the legacy, without making good the devise (*m*); unless the imperfectly executed Will contained an express condition to that effect annexed to the legacy (*n*). Under the Wills Act, however, the requisites for a Will of realty and personalty are the same.

Again, previous to the Wills Act a testator could not effectively devise after-acquired lands, although in terms he purported to do so. But in such a case the heir-at-law taking benefits under the Will was held to be put to his election by reason of the intention appearing in the Will (*o*), even though nothing was bequeathed to him which would not have descended to him as heir, if no Will had been made (*p*).

The principle, however, on which these cases were decided, seems still to apply, the principle being, that the Court will put the legatee to his election, wherever the intention of the testator is expressed in an instrument at which the Court is entitled to look, but not where the intention is expressed in an inoperative instrument. Thus the legatee will not be put to his election where the devise of land is invalid on account of a want of capacity to devise by reason of infancy or coverture (*q*).

S. C., 3 Ves. 384; *Dillon* v. *Parker*, 1 Swanst. 408, note. See also *Brodie* v. *Barry*, 2 Ves. & B. 127; and Mr. Jacob's note to his edition of Roper, Husb. & Wife, vol. i. p. 30.

(*l*) *Kidney* v. *Coussmaker*, 12 Ves. 136; 1 Swanst. 408, note; 1 Pow. Dev. 437, Jarman's edit.

(*m*) *Cary* v. *Askew*, 1 Cox, 241; *Sheddon* v. *Goodrich*, 8 Ves. 481; *Brodie* v. *Barry*, 2 Ves. & B. 127, 130; *Gardiner* v. *Fell*, 1 Jac. & Walk. 23; 1 Swanst. 406, note to *Dillon* v. *Parker*. See also *Seaman* v. *Wood*, 24 Beav. 372.

(*n*) *Boughton* v. *Boughton*, 2 Ves. Sen. 12.

(*o*) *Churchman* v. *Ireland*, 4 Sim. 520; *Schroder* v. *Schroder*, Kay, 578; 24 L. J. Ch. 510; *Hance* v. *Truwhitt*, 2 J. & H. 216. But see *Johnson* v. *Telford*, 1 Russ. & M. 244.

(*p*) *Schroder* v. *Schroder*, Kay, 578; 24 L. J. Ch. 510.

(*q*) *Hearle* v. *Greenbank*, 3 Atk.

Where, however, a testator domiciled in England devises "all his real and personal estates, whatsoever and wheresoever," and has Scotch heritable bonds, which do not pass by the Will, for want of certain formalities required by the Scotch law, the Scotch heir is not put to his election, but may take English property under the Will without giving up the bonds; for the devise is held to refer only to such property as is capable of being given by such a Will (*r*).

Widow entitled to dower:

It was formerly important to consider the question of election as applied to the case of a widow entitled to dower. But the length of time which has elapsed since the passing of the Dower Act, 3 & 4 Will. IV. c. 105, which applies to all widows married after January 1, 1834, and which in effect puts an end to questions of election in this matter, seems to make it unnecessary to consider in this Edition the effect of the authorities as formerly established.

The chief provisions of the Act are:

Sect. 4. "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his Will" (*s*).

Sect. 7. "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the Will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land."

Sect. 8. "The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the Will of her husband, duly executed as aforesaid."

Sect. 9. "Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow (*t*), such widow shall not be entitled to

695, 715; *Rich* v. *Cockell*, 9 Ves. 369; 1 Swanst. 406, note. The rule is the same where a Will, valid at the time of its execution, ceases to be valid by determination of the coverture and want of republication: *Blaiklock* v. *Grindle*, L. R. 7 Eq. 215.

(*r*) *Allen* v. *Anderson*, 5 Hare, 163; *Maxwell* v. *Maxwell*, 16 Beav. 106; 2 De G. M. & G. 705.

(*s*) A general devise is within the terms of this section: *Lacey* v. *Hill*, L. R. 19 Eq. 346, in which Jessel, M. R., dissented from *dicta* of Romilly, M. R., in *Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466.

(*t*) As to the individual right of

dower out of or in any land of her said husband, unless a contrary intention be declared by his Will."

Sect. 10. "No gift or bequest made by any husband to, or for the benefit of, his widow of, or out of, his personal estate, or of, or out of, any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his Will."

Case of two bequests, one onerous and the other beneficial.

Where a testator makes two distinct bequests in the same Will to the same person, one of which happens to be onerous and the other beneficial, *primâ facie* the legatee is entitled to disclaim the onerous legacy and to take the other (*u*). But, in such cases, it is a question of the intention of the testator to be gathered from the Will, whether the legatee must elect to take all, or none, of the gifts in the Will, or whether he may accept the beneficial gifts, and repudiate that which is burdensome (*x*). In cases, however, where onerous and beneficial property are included in the same gift, the legatee cannot disclaim the onerous and accept the beneficial unless the Will manifests a sufficient intention of the testator to the contrary. The gifts may be in substance distinct, though given by one sentence in the Will (*y*).

What constitutes an election.

The inquiry, as to what acts or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle: The questions are, whether the parties acting or acquiescing were aware of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same

election of the next of kin of a widow, where the widow has not made her election in her lifetime, see *Fytche* v. *Fytche*, L. R. 7 Eq. 494. A gift of real estate upon trust to sell and to give the widow part of the proceeds in the shape of a part of the capital or of any income of the proceeds to be invested, is a gift of an "estate or interest in the land for the benefit of the widow": *Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466; *Lacey* v. *Hill*, L. R. 19 Eq. 346.

(*u*) *Guthrie* v. *Walrond*, 22 C. D. 573; *Syer* v. *Gladstone*, 30 C. D. 614.

(*x*) *Talbot* v. *Radnor*, 3 M. & K. 254; *Warren* v. *Rudall*, 1 J. & H. 1; *Guthrie* v. *Walrond*, *ubi supra*.

(*y*) *Re Hotchkys*, 32 C. D. 408; *Guthrie* v. *Walrond*, *ubi supra*. See also *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Re Baron Kensington*, [1902] 1 Ch. 203; and *Honywood* v. *Honywood*, [1902] 1 Ch. 347; in which the above cases are discussed and the *ratio decidendi* applied.

situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time (*z*).

A party bound to elect is entitled first to ascertain the value of the funds, and for that purpose may sustain an action to have all necessary accounts taken (*a*). An election, under a misconception of the extent of claims on the fund elected, is not conclusive (*b*).

Effect of election.

Another subject of much doubt, with respect to the doctrine of election, has been, whether the election to take against the instrument induces the necessity of relinquishing the benefit given by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints; that is, as it is sometimes expressed, whether the principle, on which the doctrine of election proceeds, is forfeiture or compensation (*c*). The authorities, however, now establish, that compensation only is to be made to the persons disappointed by the election to take against the instrument (*d*). The obligation of the person electing to take under the instrument appears to be confined to confirming the instrument so far as he is able, and there is no decision decreeing compensation (*e*).

Where infants are put to their election, the Court will elect for them if it be for their benefit (*f*).

(*z*) See Mr. Swanston's note to *Dillon* v. *Parker*, 1 Swanst. 332, and the cases there collected; *Grissell* v. *Swinhoe*, L. R. 7 Eq. 291; *Cooper* v. *Cooper*, L. R. 6 Ch. 15; L. R. 7 H. L. 53. Where there are several next of kin, each of them may have a separate right of election, and, neither the election of the majority, nor that of the heir or administrator, will bind the others: *Fytche* v. *Fytche*, L. R. 7 Eq. 494.

(*a*) 1 Swanst. 332, note; *Pigott* v. *Bagley*, M'Clel. & Y. 576, *per* Alexander, C. B.

(*b*) 1 Swanst. 332, note.

(*c*) See the cases collected and discussed in the valuable note of Mr. Swanston to *Gretton* v. *Haward*, 1 Swanst. 433; and that of Mr. Jacob to his edition of Rop. Husb. and Wife, vol. i. p. 566.

(*d*) 1 Swanst. 442, note: But see Mr. Jacob's note, *ubi supra*, and *Greenwood* v. *Penny*, 12 Beav. 403. The persons disappointed by the election to take against the Will, are entitled to compensation out of the benefits given by the Will to the party so electing, in proportion to the value of the interests of which they are disappointed: *Howells* v. *Jenkins*, 1 De G. J. & S. 617; *Rogers* v. *Jones*, 3 C. D. 688.

(*e*) *Re Chesham*, 31 C. D. 466.

(*f*) *Blunt* v. *Lack*, 26 L. J. Ch. 148; *Lamb* v. *Lamb*, 5 W. R. 772.

SECTION X.

Of the Refunding of Legacies.

Under certain circumstances, legatees are bound to refund their legacies, or a rateable part of them. It will, perhaps, be most convenient to consider, 1st, In what cases the executor can compel a legatee to refund; 2ndly, In what cases a creditor has that right; 3rdly, In what cases one legatee can make another refund: It will be observed, however, that the two latter of these inquiries are not properly within the scope of this Treatise.

1st. When the executor can make a legatee refund.

1st. In what case the executor can compel a legatee to refund. The general rule on this subject was laid down by Sir John Strange, M. R., in *Orr* v. *Kaines* (*g*): "Whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest; and not permit him to bring a bill to compel the legatee, whom he *voluntarily* paid, to refund" (*h*).

But where the payment of the legacy by the executor is under the *compulsion of a suit*, he is entitled to compel the legatee to refund, in case of a deficiency of assets (*i*).

Again, if the executor pays away the assets in legacies, and *afterwards debts appear*, of which he had no previous notice, and which he is obliged to discharge, he may compel the legatees to refund (*k*).

But an executor cannot compel residuary legatees to refund if he has "paid over the assets *with notice of a debt*" (*l*).

It seems that, formerly, legatees used to give security to

(*g*) 2 Ves. Sen. 194.

(*h*) See also *Coppin* v. *Coppin*, 2 P. Wms. 296; *Re Horne*, W. N. (1904), p. 185.

(*i*) *Newman* v. *Barton*, 2 Vern. 205; *Noel* v. *Robinson*, 2 Ventr. 368.

(*k*) *Nelthorpe* v. *Biscoe*, 1 Chanc. Cas. 136; *Davis* v. *Davis*, 8 Vin. Abr. 423, tit. Devise (Q. d.), pl. 35; 1 Rop. Leg. 398, 3rd edit.; *Doe* v. *Guy*, 3 East, 120, 123, *per* Lord Ellenborough.

(*l*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18. A notice, however, of a possible remote contingent liability is *not* sufficient to disable an executor from recovering back the assets when it afterwards ripens into a debt. Notice of a liability on shares will not prevent executors calling on legatees to refund, for a liability on shares does not become a debt until a call is made: *Whittaker* v. *Kershaw*, 45 C. D. 320.

the executor for refunding, if the assets should prove insufficient (*m*).

In *Livesey* v. *Livesey* (*n*), an annuity was bequeathed to a legatee, but he was not entitled to it until he attained twenty-one: The executrix, by *mistake*, made payments to the legatee in respect of his annuity for two years before he attained that age: And it was holden that the executrix was entitled to retain them out of the future payments of the annuity (*o*).

2nd. When a creditor can make a legatee refund:

2. In what case a creditor of the testator can call on a legatee to refund. Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, whether the legacy was paid to him voluntarily or by compulsion (*p*): and he has the same right, although the testator's funds at the time of his death were sufficient to pay both debts and legacies (*q*); and although the assets were handed over to

(*m*) *Chamberlain* v. *Chamberlain*, 1 Chanc. Cas. 257; *March* v. *Russell*, 3 M. & Cr. 31, 41; *ante*, p. 1081.

(*n*) 3 Russ. Ch. C. 287.

(*o*) See also *Cooper* v. *Pitcher*, 4 Hare, 485.

(*p*) *Hodges* v. *Waddington*, 2 Ventr. 360; *Noel* v. *Robinson*, 1 Vern. 94; *Anon.*, 1 Vern. 162; *Newman* v. *Barton*, 2 Vern. 205; *Gillespie* v. *Alexander*, 3 Russ. Ch. C. 136, 137, by Lord Eldon; *March* v. *Russell*, 3 M. & Cr. 31; *Noble* v. *Brett*, 24 Beav. 499; *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18, 25; *Hunter* v. *Young*, 4 Ex. D. 256, 261. An unpaid creditor has not lost his right to compel a satisfied legatee to refund even though such creditor may be the executor himself: *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18, 25. The proviso at the end of sect. 29 of Lord St. Leonards' Act (22 & 23 Vict. c. 35) preserves the right of creditors to follow the assets of a testator, *ante*, p. 1083. If, in an action against executors for a legacy, the executors admit assets, and judgment is given for payment of the legacy *de bonis propriis*: *Quære*, whether an unpaid creditor can call upon the legatee to refund the legacy. *Semble*, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors *de bonis propriis*: *Re Brogden*, 38 C. D. 546. It would seem that the executor need not be made a defendant, at all events in cases where he has given the notices required by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, and had at the time of distribution no notice of the plaintiff's claim: *Hunter* v. *Young*, 4 Ex. D. 256.

(*q*) *Hodges* v. *Waddington*, 2 Ventr. 360; *Thomas* v. *Griffith*, 2 Giff. 504. This right may be lost by laches, acquiescence, or such a course of dealing as would render the assertion of such right inequitable: *Ridgway* v. *Newstead*, 2 Giff. 492; *S. C.*, on Appeal, 30 L. J. Ch. 889. And so the right of mortgagees of real estate, whose

the legatee by the personal representative in ignorance of the creditor's demand (*r*).

but a purchase or mortgage is valid as against an unsatisfied creditor:

If an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator. The case of an executor who is residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In this last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration; and this immunity on the part of the purchasers is not limited to cases of legal assets or to cases where the purchasers have obtained the legal estate or its equivalent (*s*). The immunity on the part of purchasers, however, does not exist where the executor or the Court administering the testator's estate, still retains control over the assets (*t*).

unless the executor, or the Court administering the estate still retains control.

3rd. When one legatee can make another refund.

3. In what cases one legatee can oblige another to refund. If the assets were originally sufficient to satisfy all the legacies, and afterwards, by the wasting of the executor, there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund, whether the legacy were paid him with or without suit (*u*). But if the assets were not originally sufficient to pay

security proves insufficient, to come against the residuary legatees of the mortgagor amongst whom his personal estate has been distributed, is a purely equitable right, and the Court will not enforce it, if there are circumstances which would make it inequitable to do so: *Blake* v. *Gale*, 32 C. D. 571.

(*r*) *March* v. *Russell*, 3 M. & Cr. 31. The rule applied in *Gillespie* v. *Alexander*, 3 Russ. 130 (*ante*, p. 1081), confining the liability of the legatee to a proportionate share of the debt, does not apply where the estate has not been administered by the Court: *Davies* v. *Nicolson*, 2 De G. & J. 693.

(*s*) *Per* Romer, J., in *Graham* v. *Drummond*, [1896] 1 Ch. 968. See also *Dilkes* v. *Broadmead*, 2 Giff. 113.

(*t*) *Noble* v. *Brett*, 24 Beav. 499; and *Hooper* v. *Smart*, 1 C. D. 90.

(*u*) *A fortiori* there can be no such right where the loss of the assets has occurred, not by the conduct of the executor, but from merely accidental circumstances: *Fenwick* v. *Clarke*, 31 L. J. Ch.

all the legacies, and one legatee receives his legacy in full, in that case the unsatisfied legatees may compel the one so paid to refund (*x*).

But it would seem, that in no case where the executor is solvent, can an unsatisfied legatee maintain a suit against another who has been satisfied: because the remedy is in the first place against the executor, who, by paying the one legacy, has admitted assets to pay all (*y*).

Legatee refunding not charged with interest.

It remains to be considered, in what cases legatees, who are compelled to refund, shall do so with interest. On this point Lord Eldon has stated (*z*) the rule to be, "If a legacy has been erroneously paid to a legatee, who has no farther property in the estate, in recalling that payment, I apprehend that the rule of the Court is not to charge interest: but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share."

728. Where one of several residuary legatees, or next of kin, has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; *secus*, if the wasting has taken place before such share was received. The burden of proof lies on those who call upon the residuary legatee or next of kin to refund, to show that the wasting took place before the share was paid over: *Peterson* v. *Peterson*, L. R. 3 Eq. 111. See *ante*, p. 1091.

(*x*) By Sir Joseph Jekyll, in *Walcot* v. *Hall*, 1 P. Wms. 495. See note (1), by Mr. Cox; *S. C.*, 2 Bro. C. C. 305. See also the observation of the Master of the Rolls in *Gillespie* v. *Alexander*, 3 Russ. Ch. C. 133; and *David* v. *Frowd*, 1 M. & K. 200. In a suit by a residuary legatee for the administration of the testator's estate the Court has jurisdiction to compel the residuary legatee to refund, for the purpose of paying the legacy of a legatee who is not a party to the suit, assets paid to the residuary legatee by the executor before the suit: *Prowse* v. *Spurgin*, L. R. 5 Eq. 99.

(*y*) *Orr* v. *Kaines*, 2 Ves. Sen. 194; 1 Rop. Leg. 399, 3rd edit.

(*z*) *Gittins* v. *Steele*, 1 Swanst. 200. See also *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

CHAPTER THE FIFTH.

OF THE RESIDUE.

SECTION I.

Of the Residuary Legatee.

WHEN the executor has paid all the debts, the funeral and testamentary expenses (*a*), and all the legacies heretofore mentioned, he must, in the last place, pay over the surplus or residue of the personal estate to the residuary legatee, if any such be nominated: And although the residuary legatee dies before the payment of debts, and before the amount of the surplus is ascertained, yet it shall devolve on his personal representative (*b*).

Duty of executor as to converting the assets into money and handing over the clear residue.

As to the duty of the executor to sell the personal estate, the law is thus stated by Lord Chelmsford, L. C., in *Wrightwick* v. *Lord* (*c*): "A residuary legatee has a right to insist that, in the course of the first year after the testator's death (*d*) the executor shall, if it be possible, pay the debts, legacies, and

(*a*) As to what are testamentary expenses, see *ante*, p. 752. There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator: *Trethewy* v. *Helyar*, 4 C. D. 53.

(*b*) *Brown* v. *Farndell*, Carth. 52; Toller, 341.

(*c*) 6 H. L. C. 217, at p. 226.

(*d*) The result of the authorities seems to be, that there is no fixed rule that conversion must take place by the end of the year, but that that is the *primâ facie* rule, and that the executors who do not convert by that time must show some reason why they did not do so; and, where the question is distinctly and fairly raised upon the pleadings, there is an onus thrown on the executors to justify the delay: *per* Sir W. Page-Wood, L. J., in *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605. Where executors have neglected to realize assets which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular circumstances: *Hughes* v. *Empson*, 22 B. 181.

funeral and testamentary expenses, so that the clear residue may be ascertained and paid over to him, or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is the duty of the executor to sell the personal estate, or, at all events, so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses (*e*), and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date that the right of those entitled to life interests in it commences, and therefore, when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest" (*f*).

Duty of executor as to real estate: Land Transfer Act, 1897.

As to real estate, the Land Transfer Act, 1897, provides that:—

Sect. 2 (3). "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies" (*g*).

Sect. 3 (1). "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment

(*e*) It would seem that the executor would not be justified in selling more than sufficient to pay debts, legacies, and funeral and testamentary expenses in the case of a residuary legatee being absolutely entitled to whom he might transfer the residue in its unconverted state. See observations of Lord Cairns in *Cooper* v. *Cooper*, L. R. 7 H. L. 62; also note (*e*), *post*, p. 1271.

(*f*) See also *ante*, p. 1118 *et seq.*

(*g*) The costs of an administration action are still payable out of real estate only so far as they have been increased by its administration: *Re Jones*, [1902] 1 Ch. 92; and *post*, pp. 1276, 1345.

of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay (*h*), all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

(2.) "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

Power to appropriate any part of the residuary estate in satisfaction of a legacy or share:

Sect. 4 (1) of the Land Transfer Act, 1897, which, notwithstanding the marginal note in the Act referring only to the appropriation of land, is not to be read as confined to real estate, but applies to all residuary estate whether real or personal (*i*), provides as follows: "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the Will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom

(*h*) The charge provided by this section does not extend to debts for which prior to the commencement of the Act the personal representatives of the debtor would not be liable as regards the personal estate; and, therefore, where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which they have no notice at the date of the conveyance to the devisees: *Re Cary and Lotts' Contract*, [1901] 2 Ch. 463.

(*i*) *Re Beverly*, [1901] 1 Ch. 681.

may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court."

where there is a trust or duty to convert, power unaffected by sect. 4 (1) of the Act as to giving notice and the like.

Apart from this Act, where there is a trust for sale and conversion it is competent to the executor and trustee to agree with a person who is entitled to a share in the proceeds of the conversion to transfer to him the property, without converting it, in satisfaction *pro tanto* of the money which would be coming to him if he had converted it. It is not necessary to go through the form of first converting the property and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold. Nor is this principle necessarily confined to the case where there is a trust for sale and conversion, for it may be that the circumstances would be such that the executor would be bound to turn assets of the testator into money and apply it to the legacy in ordinary course of administration apart from any trust for sale and conversion. Such being the principle, it is not affected by the provisions of sect. 4 (1) of the Act as to giving notice and the like (*k*).

Prior to this Act, where there was no trust or duty to convert, but simply a gift of property among certain persons, it was held that executors might appropriate specific assets to a trust share of residue or transfer them to the legatee of a share, in advance of final division (*l*), but it would seem that the provisions of sect. 4 (1) as to consent and notice and the like would now apply.

What terms of bequest are sufficient to constitute a residuary legatee.

No particular mode of expression is necessary to constitute a residuary legatee: It is sufficient, if the intention of the testator be plainly expressed in the Will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated (*m*).

(*k*) *Per* Buckley, J., in *Re Beverly*, [1901] 1 Ch. 681. See also *Elliott* v. *Kemp*, 7 M. & W. 306; *Barclay* v. *Owen*, [1889] 60 L. T. 220; *Re Lepine*, [1892] 1 Ch. 210; and *Re Hall*, [1903] 2 Ch. 226.

(*l*) *Re Richardson*, [1896] 1 Ch. 512. See also *Re Brooks*, [1897] 76 L. T. 771; *Re Nickels*, [1898] 1 Ch. 630.

(*m*) *Bland* v. *Lamb*, 2 Jac. & W. 399; *Hearne* v. *Wigginton*, 6 Madd. 120; *Fleming* v. *Burrows*, 1 Russ. 276. The term "residuary legatee" is not of an invariable nature: it must be fashioned and moulded by the context of the Will: *Singleton* v. *Tomlinson*, 3 App. Cas. 404. So in a Will which contained a

The following bequests have been held to constitute the donees residuary legatees under the respective Wills:—"I think there will be something left after all funeral expenses, &c., being paid, to give W. B., now at school, towards equipping him to any profession he may hereafter be appointed to" (*u*). "If there is money left unemployed, I desire it may be given in charity" (*o*). "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire E. M. to do, and keep the residue for her own use and pleasure" (*p*); "all that may remain of my money after my lawful debts and legacies are paid" (*q*); "whatever remains of money" (*r*); "all the rest of my money, however invested" (*s*); "household furniture, goods, ready money, debts, and securities" (*t*); "all other chattels" (*u*); "after these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister without any power or control of her husband" (*x*), without stating what was left by testator; "what is left, my books and furniture and other things" (*y*); "everything of every kind that I have now or may have at the time of my decease in my apartments at A. or elsewhere" (*z*); "after payment of all my just debts, I give all the remainder of money, goods and debts due to me" (*a*); "one-half of the money of which I am possessed to A. and the remainder equally between B. and C." (*b*); "the whole residue of money, except such

direct gift of real property, the "residuary legatee" was held to take the freehold estate of the testator not specifically devised: *Hughes* v. *Pritchard*, 6 C. D. 24; but he does not take real property undisposed of by the Will where there is nothing in the context of the Will to enable the Court to read the words "residuary legatee" as "residuary devisee," *e.g.*, where there is no direct gift of real property, and where the testator had none at the date of the Will: *Re Methuen and Blore's Contract*, 16 C. D. 696. See also *Re Morris*, W. N. (1894) 85.

(*n*) *Leighton* v. *Baillie*, 3 M. & K. 267.

(*o*) *Legge* v. *Asgill*, 1 Turn. & Russ. 265.

(*p*) *Boys* v. *Morgan*, 9 Sim. 289; 3 M. & Cr. 661.

(*q*) *Rogers* v. *Thomas*, 2 Keen, 8; *Re Egan*, [1899] 1 Ch. 688.

(*r*) *Dowson* v. *Gaskoin*, 2 Keen, 14.

(*s*) *Re Pringle*, 17 C. D. 819.

(*t*) *Avison* v. *Simpson*, Johns. 43.

(*u*) *In the goods of Sharman*, L. R. 1 P. & D. 661.

(*x*) *Re Bassett's Estate*, L. R. 14 Eq. 54.

(*y*) *In the goods of Cadge*, L. R. 1 P. & D. 543.

(*z*) *In the goods of Scarborough*, 30 L. J. P. & M. 85.

(*a*) *In the goods of Bloomfield*, 31 L. J. P. & M. 119.

(*b*) *Re Cadogan*, 25 C. D. 154.

things as are undermentioned" (*c*); "the rest of my money" (*d*); "the residue of my money" (*e*).

What terms of bequest are insufficient to constitute a residuary legatee.

The following bequests have been held *not* to constitute the donees residuary legatees:—

"In case there is any money remaining" (out of proceeds of sale after certain specific legacies) "I should wish it to be given in private charity" (*f*); "three or four thousand pounds or whatever remaining sum or sums" (*g*); "I beg that the remainder of my money and effects may be expended in purchasing a suitable present for my godson D." (*h*); "whatever may remain to my account after payment of my debts and pecuniary legacies" (*i*); "such money, stocks, funds or other securities, not hereafter specially devised, as I may die possessed of" (*k*).

What shall be included in a residuary devise under 1 Vict. c. 26, s. 25.

By the Wills Act, 1 Vict. c. 26, sect. 25, "unless a contrary intention shall appear by the Will, such real estate or interest therein, as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such Will" (*l*).

(*c*) *In the goods of White*, 7 P. D. 65.

(*d*) *In the goods of Bramley*, [1902] P. 106.

(*e*) *Re Smith*, 42 C. D. 302.

(*f*) *Ommanney* v. *Butcher*, 1 Turn. & Russ. 260.

(*g*) *Wrench* v. *Jutting*, 3 Beav. 521.

(*h*) *Borton* v. *Dunbar*, 2 Giff. 221; 2 De G. F. & J. 338.

(*i*) *Hastings* v. *Hane*, 6 Sim. 67.

(*k*) *In the goods of Aston*, 6 P. D. 203. See the cases collected, *ante*, p. 931 *et seq.*, as to restricting "goods," "chattels," and other general words, when coupled with other words of a limited signification, to things *ejusdem generis*. As to construction of the words "money," "moneys," &c., see *ante*, p. 936 *et seq.*

(*l*) As to what is a residuary devise within the meaning of this section, see *Re Brown's Trusts*, 1 K. & J. 522, from which it appears that the words in the 25th section of the Act apply to a general residuary devise and not to a devise of the rest of the property in a place where parts of the property are given beforehand to other persons: *Cogswell* v. *Armstrong*, 2 K. & J. 227; *Green* v. *Dunn*, 20 Beav. 6; *Springett* v. *Jennings*, L. R. 6 Ch. 333; *Re Mason*, [1901] 1 Ch. 619; [1903] A. C. 1. A devise of real estate by way of appointment which fails, or is void, falls into the residuary devise under this section, unless a contrary intention appear by the Will: *Freme* v. *Clement*, 18 C. D. 499. See, however, as to this case, *Holyland* v. *Lewin*, 26 C. D. 266.

Rights of residuary legatee generally:

Where the residuary legatee is nominated generally, he is entitled, in that character, to whatever may fall into the residue after the making of the Will, by lapse, invalid disposition, or other accident (*m*); or by acquirement subsequent to the date of the Will (*n*). "It has been long settled," said Sir William Grant, in *Cambridge* v. *Rous* (*o*), "that a residuary bequest of personal estate carries not only everything not disposed of, but everything that, in the event, turns out not to be disposed of." So it was observed by Sir John Leach, V.-C., in *Jones* v. *Mitchell* (*p*): "The Will as to personal estate, speaks at the time of the death of the testator, and the residuary legatee takes, not only what is undisposed of by the expressions of the Will, but that which becomes undisposed of at the death, by disappointment of the intentions of the Will."

Accordingly, where a testator bequeathed all his personal estate, *except* the money laid out in stocks, mortgages, and bonds, to A.; and as to his money in stock, and on mortgages and bonds, he gave the same to B.; and the gift to B. failed by an event analogous to a lapse; it was held that the property which was intended to be given to B. passed under the residuary bequest to A. (*q*).

(*m*) *Jackson* v. *Kelly*, 2 Ves. Sen. 285; *Kennell* v. *Abbott*, 4 Ves. 803; *Cambridge* v. *Rous*, 8 Ves. 12; *Bird* v. *Le Fevre*, 15 Ves. 589; *Roberts* v. *Cooke*, 16 Ves. 451; *Smith* v. *Fitzgerald*, 3 V. & B. 3; *Leake* v. *Robinson*, 2 Meriv. 392; *Legge* v. *Asgill*, 1 Turn. 265, *in notis*; *Andree* v. *Ward*, 1 Russ. Chanc. Cas. 260; *Reynolds* v. *Kortright*, 18 Beav. 417; *Bush* v. *Cowan*, 32 Beav. 228.

(*n*) *Bland* v. *Lamb*, 5 Madd. 412; *S. C.*, confirmed on appeal, 2 Jac. & Walk. 399; *Hearne* v. *Wiggington*, 6 Madd. 119. See *Cox* v. *Bennett*, L. R. 6 Eq. 422; *Re Knight*, 34 C. D. 518. The nomination of a residuary legatee will not prevent his taking a lapsed bequest by substitution, *i.e.*, in the place of the deceased legatee, when the testator shows his intention that the residuary legatee should so take it, and there is no inconsistency between the characters of a residuary and a particular or substituted legatee to prevent it: In fact, the latter title may be more beneficial than the former upon a deficiency of assets to pay all the debts and legacies; for as residuary legatee he can claim nothing until all debts and legacies are fully paid; but as a particular or substituted legatee, his right to an equality of payment with the rest is preserved; so that, after rateably abating with them, he is entitled to receive the remainder of the legacy: 1 Rop. Leg. 429, 3rd edit.; *Rose* v. *Rose*, 17 Ves. 347, 352.

(*o*) 8 Ves. 12, 25.

(*p*) 1 Sim. & Stu. 294.

(*q*) *Evans* v. *Jones*, 2 Coll. 516; *Blight* v. *Hartnoll*, 23 C. D. 218. See also *Thompson* v. *Whitelock*, 1 De G. & J. 490; *Re Bagot*, [1893] 3 Ch. 348. The question in such

Again, where a testatrix, by mistake, recited in her Will that she had settled upon A. a particular property, which, in fact, was still at her disposition, and the Will contained other recitals and bequests of other properties, and also a residuary bequest in favour of X., it was held by the Court of Appeal that the property mentioned in the recital passed under the residuary gift to X. (*r*).

cases is, whether the property is excepted in order to take it away, under all circumstances, and for all purposes, from the person to whom the rest is given, or whether merely for the purpose of giving it to some one else: *Bernard* v. *Minshull*, Johns. 296, 299. And see the application of this distinction in *Re Fraser*, [1904] 1 Ch. 726, where certain chattels real were held to be excepted for all purposes from a general bequest of personal estate. Where a testator makes a residuary gift with regard to a particular fund, the question in all cases will be, whether the testator by the residuary gift gives the whole fund to the residuary legatee subject to the particular gifts, or whether he gives to the residuary legatee the balance of the fund after deducting the particular gifts. In the former case, if a particular legacy lapses, or there is an invalid disposition, the gift that fails will fall into the particular residue, in the latter case it will not. See *Champney* v. *Davy*, 11 C. D. 949. This question may, of course, arise equally whether the testator is dealing with his own property, or with property over which he has merely a power of appointment, and whether that power of appointment is special or general. Of the former construction, *Fulkner* v. *Butler*, Amb. 514; *Oke* v. *Heath*, 1 Ves. Sen. 135; *Re Harries' Trust*, Johns. 199; *Carter* v. *Taggart*, 16 Sim. 423, are instances: of the latter, *Easum* v. *Appleford*, 5 My. & Cr. 56. In *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, the residuary gift was held to apply to the balance, only as to the general fund with which the testatrix was dealing, and to constitute a gift of the balance, subject to particular gifts out of that balance which failed. Where the gift is a gift of the residue subject to particular gifts which fail, they will fall into the residue, even though the failure does not arise from the happening or not happening of the event on the happening or not happening of which the Will directs such a gift to fall into the residue: *Re Meredith's Trusts*, 3 C. D. 757.

(*r*) *Re Bagot*, [1893] 3 Ch. 348; and see p. 361, where A. L. Smith, L. J., says: "I have read the cases cited, and I extract the rule of law or principle from them to be as follows: To prevent personal property which would otherwise fall into the general residue, assuming a true general residuary bequest to exist, there must be found in the Will an expression of the testator's intention not only to except such property either from the operation of the Will or from the operation of the residuary clause in the Will in favour of a particular recipient, but an intention to except it from the operation of the Will, or the residuary clause, as the case may be, whether the proposed recipient

The foundation of this general rule in respect of lapsed legacies is, that the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the Court gives effect to the general intent (*s*).

When, therefore, from the construction of the Will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed legacy is undisposed of (*t*).

in the events which happen can take the property or not. There must be found in the Will the intention that, whether the proposed recipient can take the property or not, it shall never fall into the general residue."

(*s*) *Easum* v. *Appleford*, 5 M. & Cr. 61, 62.

(*t*) By the law before the passing of the Wills Act, a general bequest did not operate as an execution of a general power of appointment, unless the intention that it should so operate could be collected from the Will, but now by sect. 27 of that Act it is enacted that: "A bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will." The result of this is, that the onus of proving that the testator did not intend to execute the power is now thrown on those who deny that the residuary bequest in question so operates. The fact of property being specifically appointed does not, if the appointment fails, show an intention that a residuary gift should not operate under sect. 27, as an execution of the power: *Re Spooner's Trusts*, 2 Sim. N. S. 129; *Bernard* v. *Minshull*, Johns. 276; *Re Elen*, W. N. (1893) 90; *Re Marten*, [1902] 1 Ch. 314. It will be observed that the section says "any personal estate which he may have power to appoint in any manner he may think proper," and applies therefore only to a general power, that is, a power which is general in regard to its objects, not a power that is general as regards the manner of its exercise: *Re Powell's Trusts*, 39 L. J. Ch. 188. In the case of a limited power the residuary bequest must be in such terms as to show an intention to execute the power, and must, of course, be in favour of an object of the power. But, when these conditions can be found in the residuary bequest, the power will be held to be executed; and this will be so, even though the Will contain an appointment which fails by reason of the appointee not being within the power, and the residuary legatee will in such case take the portion of the fund badly appointed: *Re Meredith's Trusts*, 3 C. D. 757; *Re Hunt's*

Such is the case of a residuary bequest to several as tenants in common (*u*): The share of one, dying in the testator's lifetime,

Trusts, 31 C. D. 308. There is a distinction between a general power of appointment and a limited power of appointment amongst a particular class. Where the power of appointment is general, there is a tendency to hold that the appointment, which fails as to the particular benefit intended to be bestowed on the appointee named, makes the property part of the general estate of the appointor; and thus, if a person, having a general power of appointment by Will, bequeath the fund, the subject of appointment, to executors in trust, and the trust fails as regards the particular object, the resulting trust will be in favour of the next of kin, or the residuary legatee, as the case may be, of the testator, and not in favour of the persons entitled in default of appointment: *Brickenden* v. *Williams*, L. R. 7 Eq. 310; *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423. In *Easum* v. *Appleford*, 5 My. & Cr. 56, where the resulting trust was held to be in favour of the persons entitled in default of appointment, the ground of decision was that the words of the Will negatived the intention to make the property part of the general estate, the gift being construed as the gift of the balance of the fund after deducting the amount previously given out of it, and not as a gift of the entire fund subject to the previous gift, as in *Re Harries' Trust*, Johns. 199. The question whether the donee of a general power of appointment has by his Will made the property subject to the power his own for all purposes, or has taken it out of the instrument creating the power only for the limited purpose of giving effect to the particular disposition, is a question of intention. The mere appointment of an executor is not sufficient in itself to show an intention to do so: *Re Davies' Trusts*, L. R. 13 Eq. 163; *Re Thurston*, 32 C. D. 508. See also *Re Pinède's Settlement*, 12 C. D. 667; *Re Van Hagan*, 16 C. D. 18; *Re Ickeringill's Estate*, 17 C. D. 151; *Willoughby Osborne* v. *Holyoake*, 22 C. D. 238; *Re Scott*, [1891] 1 Ch. 298; *Coxen* v. *Rowland*, [1894] 1 Ch. 406; *Re Boyd*, [1897] 2 Ch. 232; and see also *post*, p. 1306. A power of appointment in favour of any person or persons except A. is not a general power within sect. 27, but may, it seems, become so through the death of A. at the time the power is exercised: *Re Byron's Settlement*, [1891] 3 Ch. 474. A general bequest will not operate under sect. 27 as an execution of a power to appoint by Will or codicil expressly referring to the power: *Re Phillips*, 41 C. D. 417; *Phillips* v. *Cayley*, 43 C. D. 222, overruling *Re Marsh*, 38 C. D. 630. Where a general power of appointment of real estate by deed or Will has been completely exercised by deed, a general devise by the Will of the donee of the power subsequent to the deed will not *per se* amount, by virtue of sect. 27, to an exercise of a power of revocation and new appointment: *Pomfret* v. *Perring*, 5 De G. M. & G. 775; *Palmer* v. *Newell*, 20 Beav. 32; *Charles* v. *Burke*, 43 C. D. 223, note; *Re Brace*, [1891] 2 Ch. 671. Where

(*u*) See *post*, p. 1205.

does not pass; because, the testator having given to each a certain proportion of his property, according to their number,

there is a general power and a residuary gift dealing with property of the description included in the power, the power will be executed by virtue of sect. 27, although there may be no reference in the residuary gift to the power. *Wilday* v. *Barnett*, L. R. 6 Eq. 193. So a pecuniary bequest not referring to a general power of appointment over personal estate may operate under sect. 27 as an execution of the power: *S. C.*, and *Re Wilkinson*, L. R. 4 Ch. 587. So a general bequest contained in a Will prior to the instrument creating the power may operate as an exercise of the power, and the execution of the instrument containing the power and the circumstances under which it was executed cannot be looked at to show a contrary intention: *Boyes* v. *Cook*, 14 C. D. 53, questioning *Re Ruding's Settlement*, L. R. 14 Eq. 266. See also *Re Hayes*, [1900] 2 Ch. 332; [1901] 2 Ch. 529; where the power claimed to have been exercised was a special power created subsequently to the Will. And it would appear, notwithstanding the observations of Lord St. Leonards (Sug. Pow. 8th edit. p. 306), that, even in the case of a power in a settlement created by the testator himself, it is not necessary that the Will should show an intention to defeat the settlement; but a residuary bequest, though defeating the settlement, will operate as an execution of the power, unless a contrary intention appear in the Will. See *Re Clark's Estate*, 14 C. D. 422, and the observations therein on *Moss* v. *Harter*, 2 Sm. & G. 458. But, although a settlement cannot be looked at to find a contrary intention, it may be looked at to see whether the general bequest complies with the power: *Phillips* v. *Cayley*, 43 C. D. 222 (over-ruling *Re Marsh*, 38 C. D. 630); *Re Davies*, [1892] 3 Ch. 63. Where a testator in 1858 made a Will containing a general residuary devise; and afterwards executed a settlement, whereby he conveyed to trustees certain freehold property in trust for himself for life, remainder to E. for life, remainder as he by last Will should appoint, and in default for E. in fee, and subsequently in 1862 by a Will commencing "This is my last Will," in pursuance of the power in the settlement, charged the freehold with an annuity and appointed executors, but made no other disposition, and both Wills were admitted to probate, it was held that, having regard to the terms of the power, the testator had indicated an intention, that the Will of 1862 alone should operate as an execution of the power, and that consequently the residuary devise in the Will of 1858 was not a due execution of the power: *Pettinger* v. *Ambler*, L. R. 1 Eq. 510. A codicil can be read with a Will for the purpose of ascertaining the intention of the testator in the Will: *Re Clark's Estate*, 14 C. D. 422; *Re Venn*, [1904] 2 Ch. 52, *ante*, p. 835, n. (*s*). A power to appoint a sum not exceeding a certain amount to be raised and applied as the donee should think fit, may be exercised by a general devisee under sect. 27: *Re Jones*, 34 C. D. 65. Sect. 27 has, as we have seen, no application to limited powers of appointment, that is, to powers of appointment

it would not be consistent with such declared intention to give to the survivor a larger proportion (*x*). So where a testator gave one-third of the residue to A., and another one-third to B., and as to the other one-third thereof, gave 500*l.* to C., and the remainder thereof to D.; and C. died in the lifetime of the testator; it was held that the 500*l.* belonged to the next of kin, as undisposed of (*y*).

Again, the testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude him from lapsed legacies: As where it appears to be the intention of the

limited as to the objects or class in whose favour they may be exercised. In such cases the question whether a residuary devise or bequest operates as an execution of the power is a question of the intention of the testator to be gathered from the terms of the Will, and it does not seem useful to set out in detail the cases in which the question of intention has been determined, because the question must in each case turn upon the terms of the particular Will and the surrounding circumstances. The following are some of the principal cases which have been decided in late years: *Re Gratwick's Trusts*, L. R. 1 Eq. 177; *Butler* v. *Gray*, L. R. 5 Ch. 26; *Wildbore* v. *Gregory*, L. R. 12 Eq. 482; *Re Teape's Trusts*, L. R. 16 Eq. 442; *Thornton* v. *Thornton*, L. R. 20 Eq. 599; *Re Meredith's Trusts*, 3 C. D. 757; *Ames* v. *Cadogan*, 12 C. D. 868; *Re Swinburne*, 27 C. D. 696; *Von Brockdorff* v. *Malcolm*, 30 C. D. 172; *Re Wait*, 30 C. D. 617; *Re Hunt's Trusts*, 31 C. D. 308; *Re Mills*, 34 C. D. 186; *Re Cotton*, 40 C. D. 41; *Re Williams*, 42 C. D. 93; *Re Huddleston*, [1894] 3 Ch. 595; *Re Milner*, [1899] 1 Ch. 563; *Re Hayes*, [1900] 2 Ch. 332; [1901] 2 Ch. 529; *Re Mayhew*, [1901] 1 Ch. 677; *Kent* v. *Kent*, [1902] P. 108.

(*x*) *Easum* v. *Appleford*, 5 M. & Cr. 56, 62.

(*y*) *Lloyd* v. *Lloyd*, 4 Beav. 231. See also *Skrymsher* v. *Northcote*, 1 Swanst. 566; *Harris* v. *Davis*, 1 Coll. 416; *Re Lowman*, [1895] 2 Ch. 348. See further, *Master* v. *Laprimaudaye*, 2 Coll. 443; *Clowes* v. *Clowes*, 9 Sim. 403. See also *Lightfoot* v. *Burstall*, 1 Hemm. & M. 546, where there was a direction that one of the shares of the residue on a certain contingency should sink into the residue, and be held and applied accordingly. See also *Humble* v. *Shore*, *ibid.* 550, note (*a*); 7 Hare, 247; *Sykes* v. *Sykes*, L. R. 3 Ch. 301; *Re Barker's Estate*, 15 C. D. 635. In the cases, however, of *Crawshaw* v. *Crawshaw*, 14 C. D. 817; 29 W. R. 68; and *Re Rhoades*, 29 C. D. 142, where in a Will there was a direction that the respective shares should "fall into the residue," it was held that they were not undisposed of by the testator, but were divisible among the other legatees. Cf. also *Re Ballance*, 42 C. D. 62. By the later case of *Re Palmer*, [1893] 3 Ch. 369 (C. A.), *Humble* v. *Shore* is over-ruled. See also *Re Parker*, [1901] 1 Ch. 408 (where *Skrymsher* v. *Northcote* is doubted), and *Re Allan*, [1903] 1 Ch. 276.

testator that the residuary legatee should have only what remained *after the payment of legacies* (*z*).

Rights of legatee of a particular or partial residue.

Again, the testator may, by the terms of the Will, so circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue (*a*). Thus, in *Cook* v. *Oakley* (*b*), A., on board a ship, made his Will, and gave to his mother, if alive, his gold rings, buttons, and chests of clothes, and to his executor, who was on board with him, his red box, arrack, and all things not before bequeathed; and at the time of making his Will he was entitled to a considerable leasehold estate by the death of his father, of his right to which he was ignorant: It was held that A.'s executor was legatee of a particular residue, namely, of what the testator had on board the ship; and such legacy excluded him from the general residue: But that as A.'s mother died in his lifetime, his rings, buttons, and chests of clothes lapsed into such particular residue, and devolved on his executor, not as executor, but as legatee of such particular residue (*c*). And even though the word "residue" be employed by the testator, yet if it appears, on the construction of the whole Will, that he meant to use it in a more restricted sense than that of its large and general sense, comprehending whatever of his personal estates in the events which happen turns out to be undisposed of, the Court is bound to construe it in such restricted sense (*d*).

Survivorship as to residue:

Where the residuary estate is bequeathed to several persons in *joint tenancy*, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy (*e*) in the residue, their shares will

(*z*) *Davers* v. *Dewes*, 3 P. Wms. 40; *Att.-Gen.* v. *Johnstone*, Ambl. 577; *Gibson* v. *Hale*, 17 Sim. 129. It was said by Lord Eldon, in *Bland* v. *Lamb*, 2 Jac. & Walk. 406, that very special words are required to take a bequest of the residue out of the general rule; and see *ante*, p. 1199, note (*r*).

(*a*) Toller, 343; and see *ante*, p. 1198, note (*q*).

(*b*) 1 P. Wms. 302.

(*c*) See also 2 Rop. Leg. 589, 3rd edit.; *De Trafford* v. *Tempest*, 21 Beav. 564.

(*d*) *Green* v. *Pertwee*, 5 Hare, 249; *S. C.*, *sub nom. Greer* v. *Pertwee*, 15 L. J. Ch. 372; *Jull* v. *Jacobs*, 3 C. D. 703, 705.

(*e*) As to what amounts to a severance, see *post*, p. 1215.

survive to the others (*f*). But if the residue be given to several as *tenants in common*, the shares of the deceased shall not go to the survivors, but shall devolve on the testator's next of kin, according to the Statute of Distributions, as so much of the personal estate remaining undisposed of by the Will, in case the death happened in the lifetime of the testator; or shall go to the personal representatives of the deceased legatee, in case his death took place after that of the testator (*g*). in cases of several residuary legatees:

In *Perkins* v. *Baynton* (*h*), indeed, Lord Thurlow doubted whether there could be a joint tenancy of a money legacy, and said that there was no case of a residue given to persons, not executors, where they have been considered as joint tenants. But in *Crooke* v. *De Vandes* (*i*), Lord Eldon stated, that upon the doubt thus expressed by Lord Thurlow, he, at the time, looked at some of the original Wills in Doctors' Commons, where a construction had been put on them, and he made up his mind upon the point, upon which he had never had any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint tenancy; and it is upon the other side to show from some part of the context applying to that bequest, that the words are not to have their legal operation (*k*). Again, in *Jackson* v. joint tenants:

(*f*) *Webster* v. *Webster*, 2 P. Wms. 347.

(*g*) *Bagwell* v. *Dry*, 1 P. Wms. 700; *Page* v. *Page*, 2 P. Wms. 489; *Painter* v. *Salisbury*, cited in *Bennet* v. *Bachelor*, 1 Ves. 67; *Peat* v. *Chapman*, 1 Ves. Sen. 542; *ante*, pp. 963, 1201. And see 1 Vict. c. 26, s. 33, *ante*, p. 969.

(*h*) 1 Bro. C. C. 118.

(*i*) 9 Ves. 204.

(*k*) So a joint tenancy is created by a bequest, without any words of severance to "children": *Mence* v. *Bagster*, 4 De G. & Sm. 162; *Williams* v. *Hensman*, 1 Johns. & H. 546; *Noble* v. *Stow*, 29 Beav. 409; *Kenworthy* v. *Ward*, 11 Hare, 196; *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63; or "wife and children": *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518; *Newill* v. *Newill*, L. R. 7 Ch. 253; or "survivors": *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Beav. 605; or "next of kin": *Withy* v. *Mangles*, 10 Cl. & F. 215; *Baker* v. *Gibson*, 12 Beav. 101. *Secus*, as to "next of kin under the Statute of Distributions," where it is apparent that the testator refers to the statute as defining not only the persons who are, but also the title by which and the shares in which, they are to take: *Horn* v. *Coleman*, 1 Sm. & G. 169. See also *Godkin* v. *Murphy*, 2 Y. & Coll. 351; *Jenkins* v. *Gower*, 2 Coll. 537; *Re Greenwood's Trusts*, 3 Giff. 390; *Bullock* v. *Downes*, 9 H. L. C. 1; *Re Ranking's Settlement*, L. R. 6 Eq. 601; *Re Ford*, [1902] 1 Ch. at p. 224; *ante*, p. 881, note (*n*). For cases where under a gift to A. and her children, a life

Jackson (*l*), the same learned Judge observed, that it is clear that where a residue of a personal estate, consisting of a great variety of particulars, is left to two persons, their executors, administrators, and assigns, the effect is a joint tenancy (*m*).

tenants in common.

But where a money legacy or a residue is given to more persons than one, by any mode of expression *which denotes a severance*, the legatees will be tenants in common: As where the gift is to A. and B., "share and share alike" (*n*), or "equally to be divided between them" (*o*), or "respec-

estate is implied in the mother instead of A. and her children taking as joint tenants, see *Re Owen's Trusts*, L. R. 12 Eq. 316; *Combe* v. *Hughes*, L. R. 14 Eq. 415.

(*l*) 9 Ves. 595.

(*m*) See also *Swaine* v. *Burton*, 15 Ves. 370, 371; *Cookson* v. *Bingham*, 17 Beav. 262; *Morgan* v. *Britten*, L. R. 13 Eq. 28; followed in *Re Binning*, W. N. (1895) 116. Before the Married Women's Property Act, 1882, where a bequest was made to a husband and wife, a kind of joint tenancy was created, called a tenancy by entireties, that is to say, the husband and wife were treated as one person in law, and, as against other legatees of shares, took only one share between them, and the wife had no equity to a settlement out of that share: *Atcheson* v. *Atcheson*, 11 Beav. 485; *Alder* v. *Lawless*, 32 Beav. 72; *Ward* v. *Ward*, 14 C. D. 506; *Re Bryan*, 14 C. D. 516. Since the Act the husband and wife each take one-half of the joint share, but the tenancy still remains, notwithstanding the statute, a tenancy by entireties, that is to say, the husband and wife are treated as one person, and only take one share: *Re March*, 27 C. D. 166; *Re Jupp*, 39 C. D. 148. A slight indication that the husband and wife shall each take a separate share, is sufficient to prevent the application of the doctrine that they take one share between them: *Dias* v. *De Livera*, 5 A. C. 123; *Re Dixon*, 42 C. D. 306. See *ante*, p. 861. In *Thornley* v. *Thornley*, [1893] 2 Ch. 229, sums of money derived from businesses carried on by husband and wife were from time to time invested in the purchase of real estate, and conveyed by deeds, both before and after the Act, which purported to give estates to the husband and wife on terms which would have made them joint tenants if they had not been married. The parties were subsequently divorced. It was held that as to the real estate conveyed before the Act, they held, during coverture, estates by entireties, and, on the divorce, as ordinary joint tenants; and as to the real estate conveyed after the Act, they took as joint tenants, the wife's interest belonging to her for her separate use.

(*n*) *Heathe* v. *Heathe*, 2 Atk. 122; *Norman* v. *Fraser*, 3 Hare, 84; or "in equal shares": *Brown* v. *Oakshott*, 24 Beav. 254.

(*o*) *Bryan* v. *Twigg*, L. R. 3 Eq. 433; L. R. 3 Ch. 183. Where a testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his children who should be then living,

tively" (*p*), or "between them" (*q*), or "participate" (*r*). Again, where there is a bequest to A. for life, and after her decease, to her children, when they arrive at the age of twenty-one years, it has been decided that the children who attain twenty-one will necessarily take as tenants in common, though there are no words of severance used in the bequest; because, it has been said, it is contrary to the rule of law that persons, who are to take at different times, can take as joint tenants (*s*). A

and the issue of such of them as should be then dead, such issue taking only the part or share to which his, her, or their deceased parent or parents would have been entitled if living; and two children, and two grandchildren the issue of a deceased child of the testator, were living at the death of the widow; it was held that the two grandchildren took, *as between themselves*, as joint tenants, and not as tenants in common: *Bridge* v. *Yates*, 12 Sim. 645. See also *Amies* v. *Skillern*, 14 Sim. 428; *Penny* v. *Clarke*, 1 D. G. F. & J. 431, 432; *per* Turner, L. J., *Leak v. M'Dowall*, 32 Beav. 28; *Lamphier* v. *Buck*, 2 Dr. & Sm. 484; *Heasman* v. *Pearse*, L. R. 11 Eq. 522; L. R. 7 Ch. 275; *Hodges* v. *Grant*, L. R. 4 Eq. 140; *Re Woolley*, [1903] 2 Ch. 206.

(*p*) *Heathe* v. *Heathe*, 2 Atk. 122. So if there be a bequest to A. for life, with remainder to B., C. and D., with a substitutional gift of their "respective shares," in case of the death of any of them; B., C. and D. take as tenants in common: *Ive* v. *King*, 16 Beav. 46. See also *Shepherdson* v. *Dale*, 12 Jur. N. S. 156; as to which case, however, see *per* North, J., in *Re Yates*, [1891] 3 Ch. 53. But a bequest, in case of the death of any one of several legatees before his or her share shall become payable, "*to his or her children respectively*," is a gift to such children as joint tenants: *Re Hodgson's Trusts*, 1 K. & J. 178.

(*q*) *Lashbrook* v. *Cock*, 4 Mer. 70; *Richardson* v. *Richardson*, 14 Sim. 526; *Att.-Gen.* v. *Fletcher*, L. R. 13 Eq. 128. A gift to two, "with benefit of survivorship," as to a moiety, is a tenancy in common: *Paterson* v. *Rolland*, 28 Beav. 347. See also *Haddelsey* v. *Adams*, 22 Beav. 266; *Ryves* v. *Ryves*, L. R. 11 Eq. 539. A gift of a residue to be equally disposed of between five of the testator's children, whom he named, is a gift to them as tenants in common: *In the goods of Pile*, 2 Sw. & Tr. 628. See further as to what are words of severance: *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518; *Re Wilford's Estate*, 11 C. D. 267; *Re Woolley*, [1903] 2 Ch. 206.

(*r*) *Robertson* v. *Fraser*, L. R. 6 Ch. 696; in which case Lord Hatherley said (p. 699) that "anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy."

(*s*) *Woodgate* v. *Unwin*, 4 Sim. 129. This reason is ill-founded (see *Kenworthy* v. *Ward*, 11 Hare, 196; *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63). But the decision itself, may, it would seem, be supported on the ground that all joint tenants must take the same quantity of interest, whereas in that case some of the

devise of real estate in trust for all and every the children of my daughter R., their heirs and assigns, for ever was held to create a joint tenancy (*t*). Where, however, words which, according to the ordinary rule, constitute a tenancy in common, are combined with, or followed by, others which would make a tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take: As where there is a bequest to two persons "respectively in equal shares" of the interest and dividends only of the residue of the testator's estate, and the *corpus* of the residue is not to be divided or possessed until after the decease of the two, and then it is to be divided amongst such of their children only as shall be living at the death of the survivor, *per capita* and not *per stirpes* (*u*).

Words of survivorship: to what period they refer.

A considerable difficulty arises where words of severance are used in the bequest, sufficient to constitute a case of tenancy in common, accompanied by words of survivorship, inconsistent with such a tenancy; as if a residue be bequeathed to two or more equally to be divided between them, *and the survivors or survivor of them* (*x*). In *Cripps* v. *Wolcott* (*y*), Sir J. Leach, V.-C., said, that he considered it now settled, that in the case of such a bequest, if there be no special intent to be found in the Will, the survivorship is to be referred to the period of division: And that if no previous interest be given in the legacy, then the period of division is the death of the

co-tenants might take vested, others contingent interests, *ibid.* Where, however, there is a gift to A. for life, and afterwards to his children, and the vesting of their shares is not made contingent on attaining twenty-one, they take as joint tenants, notwithstanding they came into *esse* at different periods: *Ruck* v. *Barwise*, 2 Dr. & Sm. 510.

(*t*) *Re Binning*, W. N. (1895) 116, following *Morgan* v. *Britten*, L. R. 13 Eq. 28.

(*u*) *Pearce* v. *Edmeades*, 3 Y. & C. 246. See also *Currie* v. *Gould*, 4 Beav. 117; *McDermott* v. *Wallace*, 5 Beav. 142; *Vanderplank* v. *King*, 3 Hare, 1; *Doe* v. *Royle*, 13 Q. B. 100; *Abrey* v. *Newman*, 16 Beav. 431; *Begley* v. *Cook*, 3 Drew. 662; *Cranswick* v. *Pearson*, 31 Beav. 626. See also *Edwardes* v. *Jones*, 33 Beav. 348; *Re White's Trusts*, 1 Johns. 656; *Re Phené's Trusts*, L. R. 5 Eq. 346; *Appleton* v. *Rowley*, L. R. 8 Eq. 139; *Bryan* v. *Twigg*, L. R. 3 Ch. 183.

(*x*) See *Taaffe* v. *Conmee*, 10 H. L. C. 64, 78, as to the validity of such a limitation, and the distinction between such a survivorship, and that involved in an estate of joint tenancy. See also *Haddelsey* v. *Adams*, 22 Beav. 266.

(*y*) 4 Madd. 15.

testator, and the survivors at his death will take the whole legacy: But, if a previous life estate be given, then the period of division is the death of tenant for life, and the survivors at such death will take the whole legacy (*z*).

(*z*) This rule, though certainly opposed to several previous cases, and regarded by very high authority (see the judgments of Lord Cottenham, in *Pearson* v. *Casamajor*, 1 Maclean and Rob. App. Cases 714, and in *Wordsworth* v. *Wood*, 4 M. & Cr. 645, and of Lord Campbell, *S. C.* in Dom. Proc. 1 H. L. C. 156) as not settled, has been frequently recognised and acted upon, and is now fully established. But although, according to the doctrine of *Cripps* v. *Wolcott*, survivorship is to be referred to the period of distribution, that is, where the gift is immediate to the death of the testator, so as to make it merely a provision against lapse, yet the doctrine will not apply if the words of the Will show that the survivorship is to be referred to a period other than that of distribution. Thus in *Bowers* v. *Bowers*, L. R. 5 Ch. 244, the Court of Appeal, reversing the decision of Malins, V.-C., held that where there was an immediate gift to four residuary legatees and devisees in equal shares, with benefit of survivorship in case any of them should die without issue, and in case any of them should die leaving children, then the shares whether original or accruing of each so dying to go to such children, that the clause of survivorship and the limitation over to the children of the legatees were not confined to the lifetime of the testator, and intended merely to guard against lapse, and that the residuary legatees did not upon surviving the testator at once acquire indefeasible interests in their shares: and Lord Hatherley in his judgment repeated a disapproval which he had previously expressed (in *Cooper* v. *Cooper*, 1 K. & J. 658) of the doctrine laid down in *Clayton* v. *Low*, 5 B. & Ald. 656, that where a testator mentions all the contingencies, so that the first taker must die under some one or other of the circumstances mentioned, you are to add them together so as to make a certainty, and then treat the case as if the gift over were simply in case he shall happen to die and restrict the happening of that event to the testator's lifetime in order to satisfy the words importing contingency. Nor does the case of *Home* v. *Pillans*, 2 M. & K. 15 (as to which see *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, 397), decide that indefeasible vesting is not without absolute necessity to be suspended beyond the period of distribution; for though the Court no doubt leans to that construction, yet it cannot on that ground depart from the plain natural meaning of the words which the testator has used. See *Corneck* v. *Wadman*, L. R. 7 Eq. 80, in which case the words "with benefit of survivorship" were held to refer to the period when the shares of the children became absolutely vested and not to the time of payment; and *Marriott* v. *Abell*, *ibid.*, 478. See also *Woodroofe* v. *Woodroofe*, [1894] 1 Ir. R. 303; and *Re Schnadhorst*, [1901] 2 Ch. 338, 342; [1902] 2 Ch. 234. The rule was formerly thought to be otherwise as to real estate; it being considered that indefinite words of survivorship

But although the rule in *Cripps* v. *Wolcott* is conformable to reason and common sense, yet a testator is not bound to adopt that mode of disposing of his property; and if he express a different intention according to the natural import of the words of his Will, the Court must carry that intention into effect (*a*).

"Survivor" construed "other."

It may be here mentioned, that the word "survivor" has been construed "other," to give effect to the apparent intention (*b*). Thus where a fund is given between a class or number of persons as tenants in common for life, with interests in the nature of remainders to their children respectively, and a valid provision is made that in the event of the death and failure of issue of any of the original takers, the share of the original taker or takers so circumstanced shall go to the survivors or survivor of them, the words "survivors or survivor" may, if the scheme of the Will requires it, be considered as an expression of contrast used for the purpose of distinguishing the takers not so circumstanced, and therefore as meaning "others or other" (*c*):

should be referred to the death of the testator, but it has been expressly decided by the Lords Justices that the rule applies to real as well as personal estate: *Re Gregson's Estate*, 2 De G. J. & Sm. 428, overruling *Doe* v. *Prigg*, 8 B. & C. 231. As to the period to which the word "then" is to be referred, in a bequest to a class of persons "then living," see *Archer* v. *Jegon*, 8 Sim. 446: *Gaskell* v. *Holmes*, 3 Hare, 438; 1 Jarm. 851, note (*m*), 4th edit., and the cases there cited; *Re Edgington's Trusts*, 3 Drewr. 202; *Olney* v. *Bates*, *ibid.* 319; *ante*, p. 885, note (*f*); *Heasman* v. *Pearse*, L. R. 11 Eq. 522, 7 Ch. 660.

(*a*) *White* v. *Baker*, 2 De G. F. & J. 55; *Wilmott* v. *Flewitt*, 11 Jur. N. S. 820; *Evans* v. *Evans*, 25 Beav. 81. Thus the rule may not be applicable where the question is as to the effect of words referring to survivorship in divesting a vested interest, especially in instances of gifts to children after the determination of a previous life estate. See *Bouverie* v. *Bouverie*, 2 Phil. Ch. C. 349; *Tribe* v. *Newland*, 5 D. G. M. & G. 236; *Knight* v. *Knight*, 25 Beav. 111; *Evans* v. *Evans*, *ubi supra*; *Berry* v. *Briant*, 2 Dr. & Sm. 1. And see *Re Pickworth*, [1899] 1 Ch. 642, where *White* v. *Baker*, *ubi supra*, was discussed and distinguished by Lindley, M. R., and Rigby, L. J. So where there was a gift for life followed by a gift to the surviving children of B. & C., *or* their heirs *and assigns*, it was held that the rule did not apply, and that the period of survivorship was the death of the testator: *Re Hopkins' Trusts*, 2 Hemm. & M. 411. But it must be taken as the deliberate doctrine of the Court to apply the rule in every case where no very cogent reasons militate against such a construction, *ibid.* 414.

(*b*) See *ante*, p. 840, note (*u*), where other cases on this subject are set out.

(*c*) The case of *Lucena* v. *Lucena*,

But the word "survivor" must receive its natural construction, and not be read as meaning "other," unless the nature of the

7 C. D. 255, seems to establish the following propositions: (i.) That where there is a gift to children in shares, and a gift over to the surviving children of the share or shares of those dying without issue, coupled with a gift over in the case of all the children dying without issue, the word "surviving" will, in the absence of anything in the Will to show a contrary intention, be construed "other." (ii.) That this construction will obtain even though some of the shares are settled and some not. (iii.) That, if all the shares are settled, the word "surviving" may be construed not as "others," but as meaning those who survive actually in person, or figuratively in issue, taking an interest under the Will; but that, if some shares are settled and some are not, this construction is not admissible. In the absence of a gift over in the event of the death of all the children of the testator taking shares under the Will, the fact that the original shares are all settted by the Will, and that the accruing shares which the survivors take in the share of a child who dies without issue are settled in the same way as the original shares, is not by itself sufficient to show that the word "survivors" is used otherwise than in its proper sense. *Re Benn*, 29 C. D. 839. There are cases which seem to support the contention that a settlement of shares without an ultimate gift over is sufficient, but it has never been decided that it is so, and none of the latter cases tend to recognise it as by itself sufficient: *per* Cotton, L. J., *ibid.* p. 269, whose dictum on this point was followed by Joyce, J., in *Re Bilham*, [1901] 2 Ch. 169. It will be observed that in *Waite* v. *Littlewood*, L. R. 8 Ch. 70, the case in which Lord Selborne first suggested what may be called the stirpital construction of the word "surviving" or "survivors," there was an ultimate gift over in the event of the death of all the children. See also *Re Bilham, ubi supra*. *Wake* v. *Varah*, 2 C. D. 348, is another instance where the ultimate gift over on the death of all the children of the testator without issue led to the word "survivor," in a clause of accruer, being construed "other." In that case the testator left the residue of his estate in equal shares to his three children for their respective lives; there was an accrual clause and an ultimate gift over in the event of the death of all the children without issue; and the stirpital construction of the accrual clause was adopted in favour of the issue of a child of the testator, although that child predeceased the last survivor of the three children. In *Beckwith* v. *Beckwith*, 46 L. J. Ch. 98, where the Will was very similar, but there was no ultimate gift over in the event of the death of all the children, the Court construed "survivor" strictly, and refused to adopt the stirpital construction. Cf. also *Re Robson*, W. N. (1899) 260; *Milsom* v. *Awdry*, 5 Ves. 465. The importance of the gift over on failure of issue of all the objects as justifying the construction of "surviving" or "survivors" otherwise than literally, is dwelt on by Kay, J., in his judgment in *Re Bowman*, 41 C. D. 525, 531, where he says that the decisions seem to him to

disposition itself, or the context of the Will, renders a de-

establish the following propositions: (1) Where the gift is to A., B., and C., equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life, with remainder to their children, only children of survivors can take under the gift over. See *Re Horner's Estate*, 19 C. D. 186; *Re Benn*, 29 C. D. 839. (2) If to similar words there is added a limitation over, if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. See *Waite* v. *Littlewood*, L. R. 8 Ch. 70; *Wake* v. *Varah*, 2 C. D. 348; *Badger* v. *Gregory*, L. R. 8 Eq. 78. The third proposition enunciated by Kay, J., was to the effect that they also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children, to the surviving tenants for life and their respective children, in the same manner as their original shares. This third proposition was, however, dissented from in *Re Robson*, *ubi supra*, in *Harrison* v. *Harrison*, [1901] 2 Ch. 136, and (by the Court of Appeal) in *Inderwick* v. *Tatchell*, [1901] 2 Ch. 738. See also *Re Rubbins*, 78 L. T. 218, where *Re Bowman* was distinguished. It will be seen from the above propositions that the learned judge did not consider a general gift over on the extinction of the class an absolute *sine quâ non*. It will be remembered, as is pointed out in this judgment, that although there may be older decisions which seem to show that "survivors" may easily be construed "others," yet the tendency of modern decisions is to adhere as closely as may be to a literal construction, and, only in cases of ambiguity to adopt that possible meaning of words, which is most in conformity with the general scheme of the Will, and avoid the consequence which the testator can hardly have deliberately intended. So again, in the case of *King* v. *Frost*, 15 A. C. 548, Lord Macnaghten says that the construction of the words "survivors and survivor" as "others or other" is not to be adopted, unless it is required to carry out an intention apparent on the face of the Will which would otherwise remain unfulfilled. It will be observed in that case it was sought as an alternative construction to construe "survivor" as "longest liver," and to say that the "longest liver" dying without issue, took under the accruer clause the share which had been given to him for life with remainder to his children in tail, on his own death as the survivor. This construction was based on decisions of Jessel, M. R., in *Madan* v. *Taylor*, 45 L. J. Ch. 539, of Fry, J., in *Davidson* v. *Kimpton*, 18 C. D. 213; and of Chitty, J., in *Re Roper's Estate*, 41 C. D. 409, but Lord Macnaghten refused to adopt this construction whereby the longest liver as survivor would on his own death without issue take indefeasibly the share originally intended for him and his children. The view adopted by Lord Macnaghten adverse to the decisions in the above cases seems to have been the view adopted by

parture necessary to effectuate the apparent intention of the testator (*d*).

Survivorship in case of a gift as to a class.

In *Barber* v. *Barber* (*e*), a testator by his Will directed, that in the event of the death of his son and daughter under twenty-one, the property bequeathed to them should devolve on and become the property of four persons, *each particularly named and described*, to be divided betwixt them in equal proportions, and to their heirs for ever; which last-mentioned four persons he appointed executors, and he afterwards appointed two other executors: One of the four persons, and also both of the after appointed executors, renounced probate, and declined to act: It was not disputed that the bequest made to these four persons was made to them *as executors*: that is, on condition that they took upon themselves that office, and consequently, that the one who had renounced could not claim his share (*f*): But on the one hand, it was insisted that his share was a lapsed legacy, and went to the next of kin of the testator; while, on the other hand, the three other persons named as residuary legatees with him who had renounced, contended that they were entitled to the residue in thirds, including, therefore, the share destined for him: Lord Cottenham decided that they were not so entitled, but that the share had become undisposed of, and belonged to the next of kin: And his Lordship, in giving judgment, made the following observations:

"This, as all other questions of construction, must depend upon the intention. A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and

Kay, J., in *Re Mortimer*, 54 L. J. Ch. 414, and North, J., in *Askew* v. *Askew*, 57 L. J. Ch. 629, subsequently to the decision of Jessel, M. R., and also the view adopted by Sir W. Page Wood in *Re Corbett's Trusts*, Johns. 591, prior to that decision. And see also *Ranelagh* v. *Ranelagh*, 41 W. R. 549.

(*d*) *Crowder* v. *Stone*, 3 Russ. 217; *Cromek* v. *Lumb*, 3 Y. & Coll. 565; *Leeming* v. *Sherratt*, 2 Hare, 14; *Smith* v. *Osborne*, 6 H. L. C. 375, 393; *Re Horner's Estate*, 19 C. D. 186; *Re Benn*, 29 C. D. 839; *King* v. *Frost*, *ubi supra*. "Survivors" has never been read "others" when the gift over is to a separate and distinct class: *De Garagnol* v. *Liardet*, 32 Beav. 608. When the word "survivor" is applied to a class of persons and individuals of that class are named, its natural meaning is "the longest liver of those who are named:" *Taaffe* v. *Conmee*, 10 H. L. C. 64.

(*e*) 3 My. & Cr. 688.

(*f*) See *ante*, p. 1027.

descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C. and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might at the time constitute the class, or to certain individuals, who, it was supposed, would constitute it? Such would appear to be the question to be asked, and the point to be ascertained: but the more important inquiry is, whether the authorities justify and support this view of the case."

Then, after dealing with the authorities (including *Knight* v. *Gould*) (*g*), his Lordship proceeds:—

"The result, therefore, of the authorities, supposing them strictly to apply, is in favour of the claim of the next of kin. There is the case of *Page* v. *Page* (*h*), decided by Lord King and approved by Lord Talbot, and in two cases approved and acted upon by Lord Hardwicke; whereas, in support of the claim of the acting executors, there is only the case of *Hunt* v. *Berkley* (*i*), decided, indeed, by a high authority, Sir Joseph Jekyll, but disapproved by Lord Hardwicke, and overruled by every subsequent case in which the point has arisen. . . . This case, therefore, has nothing in common with *Knight* v. *Gould* (*k*), or any other case in which the gift has been construed to be in favour of such as might act as executors. If, then, the class intended to take be not such as might, at the time, be the executors, it must be such of the executors named as might, at

(*g*) 2 M. & K. 295, see *ante*, p. 967.

(*h*) 2 P. Wms. 489.

(*i*) Mosely, 47; *S. C.*, 1 Eq. Abr. 243.

(*k*) 2 M. & K. 295, see *ante*, p. 967.

the time, be also of the number of the residuary legatees named; but that is only another mode of describing the residuary legatees; and, if their situation as residuary legatees be considered, they are only tenants in common of the residue, between whom there can be no survivorship" (*l*).

In case of several executors entitled as such to the residue:

It must here be observed, that where co-executors take a residue in that character, they take as joint-tenants: Therefore if one of them dies after the death of the testator, but before the severance of the joint tenancy in the residue, his share will survive to his co-executors, and his own executors or administrators will be excluded, as well as the next of kin of the testator (*m*). Thus, in *Baldwyn* v. *Johnson* (*n*), where two executors divided a part of the testator's property, but lodged a sum in the funds for securing the payment of an annuity; it was held, that as to this they were joint-tenants, and that it would survive upon the death of one to the other (*o*). So in *Griffiths* v. *Hamilton* (*p*), all the executors died except two, Hoare and Griffiths: Hoare alone proved and died: After his death Griffiths proved: And he was declared entitled, as surviving executor, to all the testator's personal estate not reduced into possession and divided before the death of Hoare.

What is a severance of the joint tenancy.

The question as to what shall amount to a severance of the joint-tenancy, was much considered in the case of *Gould* v. *Kemp* (*q*). There a testatrix bequeathed the residue of her property "to my executors, hereinafter named, to enable them to pay my debts, legacies, funeral, and testamentary charges, and also to recompense them for their trouble, equally between

(*l*) See also *Re Gibson*, 2 Johns. & H. 656, and the *dictum* of Wood, V.-C., as to the case of *Knight* v. *Gould*, *ante*, p. 967, note (*e*). See also *ibid.*, and *ante*, p. 963, note (*n*), where the cases are collected as to what is a gift to a class. See further *Gould* v. *Kemp*, 2 M. & K. 304, and *Re Colley's Trusts*, L. R. 1 Eq. 496. Where there is a gift to a class, that means a gift to such of the class as shall be living at the death of the testator: *Habergham* v. *Ridehalgh*, L. R. 9 Eq. 395, 400.

(*m*) *Frewen* v. *Relfe*, 2 Bro. C. C. 220; *White* v. *Williams*, 3 V. & B. 72; *S. C.*, Cooper, 58. See also the judgment of Lord Brougham, in *Knight* v. *Gould*, 2 M. & K. 299—303.

(*n*) 3 Bro. C. C. 455.

(*o*) But in *Partridge* v. *Pawlet*, 1 Atk. 467, Lord Hardwicke laid it down as a rule, that if two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each.

(*p*) 12 Ves. 298.

(*q*) 2 M. & K. 304.

them. I do nominate, constitute, and appoint my said trustees, James Kemp, James Kemp the younger, and John Prior Ward, to be executors of this my Will:" James Kemp the elder died in the lifetime of the testatrix; and it was held, that as the gift was to the three, as a class, in their official character, the whole residue vested in the two survivors (*r*): James Kemp the younger and Ward proved the Will, and took on them the office of executors: Some years afterwards, but before any severance of the residuary property had been made, a letter was written and delivered by Kemp to Ward, who at the time was confined to his bed by sickness, engaging to secure to his family, in any way he might desire by his Will, a moiety of the property bequeathed to them by the Will of their testatrix: And it was held by Sir John Leach, M. R., and afterwards by Lord Brougham, on appeal, that this letter amounted to a severance of the joint tenancy.

Again, where leasehold property was given by Will to two sisters as joint tenants and they mutually agreed to bequeath it in trust for each other for life and for their nieces after the death of the survivor, and, one sister having died, the survivor made a Will giving the property in a different manner, it was held that the agreement between the sisters, carried out by the making of the Will, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common (*s*).

What is not a severance of the joint tenancy.

The several receipts by joint tenants of a portion of the trust fund does not destroy the joint tenancy as to the remainder of the fund (*t*). Nor does the employment by them of the estates bequeathed in their partnership trade (*u*). Nor is the marriage of one of them being a daughter a severance, unless the marriage divests the property from the wife and vests it in the husband (*x*).

(*r*) See *ante*, p. 967.

(*s*) *Re Wilford's Estate*, 11 C. D. 267.

(*t*) *Leak* v. *McDowall*, 32 Beav. 28.

(*u*) *Brown* v. *Oakshott*, 24 Beav. 254. See further as to what amounts to a severance of joint tenancy, *Williams* v. *Hensman*, 1 Johns. & H. 546; *Caldwell* v. *Fellowes*, L. R. 9 Eq. 410; *Baillie* v. *Treharne*, 17 C. D. 388; *Burnaby* v. *Equitable Rev. Int. Soc.*, 28 C. D. 416; *Re Hewett*, [1894] 1 Ch. 362; *Palmer* v. *Rich*, [1897] 1 Ch. 134.

(*x*) *Re Butler*, 38 C. D. 286 (overruling on this point *Baillie* v. *Treharne*, 17 C. D. 388). From which case it appears that by the common law marriage effects a severance only with regard to the chattels personal in possession of the wife,

SECTION II.

Of the Right of the Executor to the Residue, in case there is no Residuary Legatee.

If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs clearly to the next of kin: But if the testator appointing an executor makes no disposition of the residue, a question arises whether it shall belong to such executor or to the next of kin: And this is an inquiry which has given rise to much litigation and difficult discussion: But since the passing of the Executors Act, 1830 (1 Will. IV. c. 40), this subject has been freed from the great variety of distinctions which were formerly established with respect to it.

Rule at law prior to 1830.

At law, it was the rule, from the earliest period, that the whole personal estate devolved on the executor: and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there should be any surplus, it should vest in him beneficially (*y*).

Rule in equity.

In equity, *primâ facie*, the rule was the same as at law (*z*). But the rule was controlled in equity, in all cases where a necessary implication or strong presumption appeared, that the testator meant to give only the *office* of executor, and not the beneficial interest in the residue: In all such cases, the executor was considered a trustee for the next of kin of the testator; or in cases where no next of kin can be found, a trustee for the Crown (*a*).

not with regard to chattels real, or choses in action. See also *Re Barton's Will*, 10 Hare, 12, and *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518. But since the passing of the Married Women's Property Act, 1882, marriage, it would seem, no longer operates as a severance of the wife's interest as joint tenant except in case of property of a married woman not affected by that Act.

(*y*) *Att.-Gen.* v. *Hooker*, 2 P. Wms. 340; *Southcot* v. *Watson*, 3 Atk. 228; *Urquhart* v. *King*, 7 Ves. 225.

(*z*) See Lowndes on Legacies, 249, 250.

(*a*) *Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Taylor* v. *Haygarth*, 14 Sim. 8, 12; *Russell* v. *Clowes*, 2 Coll. 648; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Re Bond*, [1901] 1 Ch. 15. The law is not altered by stat. 1 Will. IV. c. 40, s. 2: *Johnstone* v. *Hamilton*, 11 Jur. N. S. 777, *coram* Stuart, V.-C. See *post*, p. 1219, note (*d*).

1 Will. 4, c. 40.

Such being the state of the jurisdiction of the Courts of Equity in cutting down the right of the executor, the Executors Act, 1830 (1 Will. IV. c. 40), was passed, which, after reciting that "testators by their Wills frequently appoint executors, without making any express disposition of the residue of their personal estate; and whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate (*b*); and whereas it is desirable that the law should be extended in that respect," proceeds to enact, "that when any person shall die, after the first day of September next after the passing of this Act, having by his or her Will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the Will or any codicil thereto, that the person or persons so appointed executor or executors, was or were intended to take such residue beneficially" (*c*).

after 1st Sept. 1830, executors to be deemed to be trustees for persons entitled to any residue under the Statute of Distributions, unless otherwise directed by Will:

(*b*) See *Stewart* v. *Stewart*, 15 C. D. 539, 543, where Jessel, M. R., discusses the effect of the statute. And see also *post*, p. 1241.

(*c*) It has been contended that this Act provides only for the case in which the property is vested in the executor *by virtue of his appointment*, and that it does not apply to a case where he takes it by virtue of an express gift: But in *Love* v. *Gaze*, 8 Beav. 472, a testator appointed A. and B. his executors, and he gave them all his personal estate, "that is to say, for you to pay all as follows:" He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death:" And it was held by Lord Langdale, under this statute, that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin; as the intention that they should take beneficially did not appear by the Will: *Saltmarsh* v. *Barrett*, 29 Beav. 474; 3 De G. & F. 279. The statute was meant to cast on the executor the burthen of proving, from the testamentary instrument, a distinct intention that he should take the residue beneficially: *Juler* v. *Juler*, 29 Beav. 37; *Williams* v.

not to affect rights of executors where there is not any person entitled to the residue.

And by the second section it is further provided and enacted, "That nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of" (*d*).

It is necessary, however, with relation to questions which may yet arise respecting Wills of persons who have died previously to September 1st, 1830, and respecting Wills to which the statute does not apply by reason of the residue being expressly disposed of (*e*), or by reason of the deceased having left no next of kin (*f*), to review briefly the grounds on which the Courts of Equity had proceeded, until the time of the passing of the above Act, in deciding either that the executor was entitled to the residue beneficially, or that he was merely a trustee for the next of kin.

Arkle, L. R. 7 H. L. 606. For instances where it has been held that such an intention did not sufficiently appear, see *Juler* v. *Juler*, 29 Beav. 34; *Re West*, [1900] 1 Ch. 84; and for instances where it has been held that it did sufficiently appear, see *Harrison* v. *Harrison*, 2 Hemm. & M. 237; *Shepherd* v. *Nottidge*, 2 Johns. & H. 766. The trusteeship of executors created by 1 Will. IV. c. 40, was not intended to be different in its nature from that which existed previously, under the rule established in Courts of Equity, namely, that in the absence of special circumstances executors were not to be regarded as express trustees: *Re Lacy*, [1899] 2 Ch. 149.

(*d*) The statute, it would seem, has made no alteration in the law except in cases where the deceased has left next of kin: *Taylor* v. *Haygarth*, 14 Sim. 8; *Russell* v. *Clowes*, 2 Coll. 648; *Re Bacon's Will*, 31 C. D. 460, 463. See also *Chester* v. *Chester*, L. R. 12 Eq. 444. Cf. also *Re Bond*, [1901] 1 Ch. 15, where the Will contained a legal devise to a tenant for life, and nothing more; the tenant for life sold under the powers of the Settled Land Acts; and it was held, distinguishing *Taylor* v. *Haygarth*, *ubi supra*, that on the death of the tenant for life the proceeds of sale went to the Crown as *bona vacantia*, in the absence of any heir-at-law. If there are no next of kin, and no intention is disclosed on the face of the Will that the executors shall be excluded from taking beneficially, they will be entitled as against the Crown: *Russell* v. *Clowes*, 2 Coll. 648. And the question, in such case, to be determined is exactly the same as if the testator had died before the passing of the Act, and had left next of kin: *Read* v. *Stedman*, 26 Beav. 495; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182.

(*e*) See *Saltmarsh* v. *Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*f*) See *supra*, note (*d*).

What is sufficient in cases not within the Act, to raise a presumption against the executor's title:

For this purpose it is necessary to consider what circumstances have been held sufficient to raise that presumption, which, according to the rule above laid down, must exist, in cases not within the Statute, in order to preclude the executor from taking the residue beneficially.

the words "in trust":

In the first place, where the executor is expressly appointed *in trust* (*g*), or the residue is bequeathed to him *in trust* (*h*), though no trusts are declared (*i*), or though the trusts declared do not exhaust the whole property (*k*), he shall be a trustee for the next of kin: But it may be otherwise, where he is made trustee of some particular fund, and not the whole residue (*l*).

character of trustee plainly affixed:

The rule is the same where the character of trustee is plainly affixed to him, though not by express words: As where there is a direction to the executor to "keep a proper account" (*m*): or where the testator appoints him, entreating him to take the office (*n*), or directs that the executor shall be saved harmless from all expenses attending the execution of the Will (*o*); or declares that the whole of the property shall pass by the Will "according to law" (*p*); or appoints the executor "to see my Will put in force" (*q*).

(*g*) *Pratt* v. *Sladden*, 14 Ves. 198; *Dawson* v. *Clark*, 18 Ves. 254; *Vezey* v. *Jamson*, 1 Sim. & Stu. 69.

(*h*) *Graydon* v. *Hicks*, 2 Atk. 18; *Pratt* v. *Sladden*, 14 Ves. 198.

(*i*) *Dawson* v. *Clark*, 15 Ves. 414, by Sir W. Grant; 18 Ves. 254, by Lord Eldon; *Vezey* v. *Jamson*, 1 Sim. & Stu. 69; *Taylor* v. *Haygarth*, 14 Sim. 8, 12.

(*k*) *Robinson* v. *Taylor*, 2 Bro. C. C. 589; *Dawson* v. *Clark*, 18 Ves. 257, *per* Lord Eldon; *Ellcock*, v. *Mapp*, 3 H. L. C. 492; 2 Phil. Ch. C. 793 (overruling the decree of the V.-C. in *Mapp* v. *Ellcock*, 15 Sim. 568, and the opinion of Sir W. Grant in *Dawson* v. *Clark*, 15 Ves. 409; 2 V. & B. 399); *Read* v. *Stedman*, 26 Beav. 495. So where the trust fails under the Mortmain Act: *Dacre* v. *Patrickson*, 1 Drew. 782; *Johnstone* v. *Hamilton*, 11 Jur. N. S. 777; *Re West*, [1900] 1 Ch. 84.

(*l*) *Batteley* v. *Windle*, 2 Bro. C. C. 31; *Griffiths* v. *Hamilton*, 12 Ves. 298; *Pratt* v. *Sladden*, 14 Ves. 198; *Russell* v. *Clowes*, 2 Coll. 648.

(*m*) *Gladding* v. *Yapp*, 5 Madd. 56.

(*n*) *Lord North* v. *Purdon*, 2 Ves. Sen. 495; *Seley* v. *Wood*, 10 Ves. 71; *Langham* v. *Sanford*, 17 Ves. 451; *Giraud* v. *Hanbury*, 3 Meriv. 150.

(*o*) *Dean* v. *Dalton*, 2 Bro. C. C. 634; *Saltmarsh* v. *Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*p*) *Cranley* v. *Hale*, 14 Ves. 307.

(*q*) *Braddon* v. *Farrand*, 4 Russ. Chanc. Cas. 87; *Barrs* v. *Fewkes*, 2 H. & M. 60. The question in these cases is, whether such words merely import the motive of the gift, or whether they express the very object of the bequest, *ibid.* 66.

So a presumption against the executor may arise from the condition of the party appointed, as where the testator names a mercantile firm to be his executors (*r*); or the person who shall for the time being fill a certain office, as that of ambassador from a particular country (*s*).

If the character of trustee is affixed by the Will to one of several executors, they are all trustees; for there is no instance of making one a trustee, and the others not (*t*).

legacy given to a sole executor:

Again, it has been long settled that an express legacy, however small, to a sole executor, will raise the necessary presumption against him (*u*); notwithstanding legacies are also given to the next of kin (*x*); and so will a legacy which is given to him as one of a class, as a legacy to the children of A., of which the executor is one (*y*); and notwithstanding the legacy is specific (*z*). Nor will it make any difference that the appointment to the office and the gift of the legacy are in different parts of the Will; though it may be questionable whether the presumption arises, when a legacy is given by the Will, and the executor appointed by a codicil (*a*).

The presumption, however, will not be raised against the executor by a particular legacy to him for life, *with remainder over* (*b*), or by an exceptive bequest to him out of a subject bequeathed to another (*c*). But a gift of a reversionary interest will have that effect (*d*), unless, perhaps, it be contingent (*e*).

(*r*) *De Mazar* v. *Pybus*, 4 Ves. 644.

(*s*) *Urquhart* v. *King*, 7 Ves. 225; *Griffiths* v. *Hamilton*, 12 Ves. 309.

(*t*) *White* v. *Evans*, 4 Ves. 21; *Milnes* v. *Slater*, 8 Ves. 295; *Sadler* v. *Turner*, 8 Ves. 617.

(*u*) *Farrington* v. *Knightly*, 1 P. Wms. 545; *Southcot* v. *Watson*, 3 Atk. 226; *Cradock* v. *Owen*, 2 Sm. & G. 241. But not a legacy to his wife: *Fruer* v. *Bouquet*, 21 Beav. 33.

(*x*) *Andrew* v. *Clark*, 2 Ves. Sen. 162; *Kennedy* v. *Stainsby*, 1 Ves. 66, note.

(*y*) *Abbott* v. *Abbott*, 6 Ves. 343.

(*z*) 2 Rop. Leg. 643, 3rd edit.; *Randall* v. *Bookey*, 2 Vern. 425; *Southcot* v. *Watson*, 3 Atk. 226; *Martin* v. *Rebow*, 1 Bro. C. C. 154.

(*a*) *Langham* v. *Sanford*, 2 Meriv. 21.

(*b*) *Granville* v. *Beaufort*, 1 P. Wms. 114. *Secus*, where there is no ulterior disposition: *Zouch* v. *Lambert*, 4 Bro. C. C. 326: or where the gift is of the *residue* for life: *Joslin* v. *Brewet*, Bunb. 112; *Dicks* v. *Lambert*, 4 Ves. 725.

(*c*) *Griffiths* v. *Rogers*, Prec. Chanc. 231; 2 Rop. Leg. 646, 3rd edit.

(*d*) *Seley* v. *Wood*, 10 Ves. 71; *Oldman* v. *Slater*, 3 Sim. 84.

(*e*) *Lynn* v. *Beaver*, 1 Turn. & Russ. 63.

Again, the presumption will not arise, where the executor legatee is an infant (*f*).

legacy given to one of several executors:

Moreover, a legacy to *one of several* executors will not raise the presumption against him (*g*); unless it be given to him *for his care and trouble* (*h*): Nor will the presumption be otherwise raised by unequal legacies to all the executors (*i*): But where *equal* legacies are given to them all, the presumption is as strong as in the case of a legacy to a sole executor (*k*). If a legacy be given to one of several executors *for his care and trouble*, it makes all the executors trustees (*l*).

ineffectual or inchoate residuary clauses:

Where the residuary bequest lapses, the executor is not entitled (*m*); nor where it is void (*n*): Nor where the design of the testator to dispose of the residue, although not carried into effect, is evident: As where he bequeaths the residue in such manner as he shall appoint, and never makes any appointment (*o*): or where he leaves a blank for the name of the residuary legatee (*p*): or where he professes to dispose of the residue, but does not (*q*): or where, by an unexecuted codicil, he refers to the Will as not having disposed of the residue, and sketches out a disposition of it, which he leaves imperfect (*r*). So the presumption will be raised against the executor where the testator partially obliterates the residuary clause, leaving

(*f*) *Williams* v. *Jones*, 10 Ves. 77.

(*g*) *Buffar* v. *Bradford*, 2 Atk. 222; *Griffiths* v. *Hamilton*, 12 Ves. 298.

(*h*) *White* v. *Evans*, 4 Ves. 21; *May* v. *Lewin*, 2 P. Wms. 159, *in notis*. See *Dawson* v. *Thorne*, 3 Russ. Chanc. Cas. 235, 239.

(*i*) *Blinkhorne* v. *Feast*, 2 Ves. Sen. 27, 29; *Bowker* v. *Hunter*, 1 Bro. C. C. 328; *Oliver* v. *Frewen*, 1 Bro. C. C. 590; *Griffiths* v. *Hamilton*, 12 Ves. 309; *Russell* v. *Clowes*, 2 Coll. 648.

(*k*) *Ommanney* v. *Butcher*, 1 Turn. & Russ. 260, 269. See also *Clennell* v. *Lewthwaite*, 2 Ves. 471, by Lord Alvanley; *Taylor* v. *Haygarth*, 14 Sim. 8, 12; *Saltmarsh* v. *Barrett*, 29 Beav. 474; 3 De Gex, F. & J. 279.

(*l*) See *supra*, note (*h*).

(*m*) *Bennet* v. *Batchelor*, 3 Bro. C. C. 28.

(*n*) *Att.-Gen.* v. *Tomkins*, Ambl. 216.

(*o*) *Davers* v. *Dewes*, 3 P. Wms. 40; *Mordaunt* v. *Hussey*, 4 Ves. 117; *Dawson* v. *Clark*, 15 Ves. 414, by Sir Wm. Grant.

(*p*) *Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 91; *North* (*Lord*) v. *Purdon*, 2 Ves. Sen. 495; *Dawson* v. *Clark*, 15 Ves. 414. Cf. *Re Bacon's Will*, 31 C. D. 460, *post*, p. 1223, note (*x*).

(*q*) *Oldham* v. *Carleton*, 2 Cox, 399.

(*r*) *Nourse* v. *Finch*, 1 Ves. 344; *S. C.*, 2 Ves. 78. But merely leaving a blank between the end of the Will and the signature is not sufficient to exclude the executor: *White* v. *Williams*, 3 Ves. & B. 72.

nothing but the introductory words (*s*): or where he professes to dispose of *part* only of his personal estate (*t*).

when parol evidence admissible.

It remains to consider briefly the subject of the admissibility of parol evidence with reference to this question. Such evidence is not admissible in the first instance, on behalf of the next of kin, to raise the presumption for the exclusion of the executor (*u*). But when such presumption is raised from the words of the Will, parol evidence is admissible, on behalf of the executor, for the purpose of rebutting such presumption (*x*); and such evidence may then be opposed by similar evidence on behalf of the next of kin (*y*).

If, however, the Will conveys upon the face of it an unequivocal indication of an intention to clothe the executor with a fiduciary character only, as where he is expressly appointed *in trust* (*z*); or a legacy is expressly given to him for his care

(*s*) *Mence* v. *Mence*, 18 Ves. 348.

(*t*) *Urquhart* v. *King*, 7 Ves. 225.

(*u*) *White* v. *Williams*, 3 V. & B. 72; *Langham* v. *Sanford*, 2 Meriv. 17.

(*x*) *Clennell* v. *Lewthwaite*, 2 Ves. 474; *Langham* v. *Sanford*, 17 Ves. 442, 443; *Lynn* v. *Beaver*, 1 Turn. & R. 66; *Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 95. It will be observed that parol evidence is not admissible in cases where it is conclusively apparent on the Will itself that the executor was meant to be a trustee only (*per* Lord Eldon in *Langham* v. *Sanford*, 2 Mer. 6, 17), as distinguished from the case where there is a mere presumption against the executor from the words of the Will, *e.g.*, the presumption arising from a particular legacy to the executor. The case of an imperfect Will manifesting an inchoate intention to appoint a residuary legatee seems to be on the border line; it may, or may not, be conclusive to show an intention that the executor was meant to be a trustee only: and in *Re Bacon's Will*, 31 C. D. 460, where a testatrix made her Will on a printed form, and after giving certain legacies gave all her estate real and personal unto —— to and for —— own use absolutely, and then appointed C. W. C. to pay all her debts, &c., and to be the executor of her Will, Kay, J., held that it was quite conceivable that the testatrix believed that the effect of the blanks would be to entitle the executor to the residue, and that the effect of the blanks under the circumstances was only to raise a presumption against the executor of a resulting trust for the next of kin, and that parol evidence was admissible to rebut that presumption. No allegation is necessary to put in issue that he is entitled by the effect of parol evidence, that being included in the allegation that he is entitled as executor: *Lynn* v. *Beaver*, 1 Turn. & R. 66.

(*y*) *Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 91, 95.

(*z*) *Gladding* v. *Yapp*, 5 Madd. 59.

and trouble (*a*), parol evidence is not admissible to support the claim; for that would be to allow parol evidence to contradict the Will (*b*).

Not admissible in cases within the statute 1 Will. IV. c. 40.

In cases within the operation of the statute 1 Will. IV. c. 40 (*c*), parol evidence is, in all cases, inadmissible to show that the testator intended his executors to take beneficially; for the Act required that the intention should appear by the Will (*d*).

Trust for next of kin where trust expressed on face of Will insufficiently declared.

Sometimes where there is a gift of the residue to a trustee other than the executor, the gift fails because the trusts are insufficiently declared, in such a case the trustee can take no beneficial interest, neither can any one claim successfully as a *cestui que trust*, and the result is that the residue will have to be distributed as upon an intestacy under the Statute of Distributions. If it is expressed on the face of the Will that the legatee is a trustee, but the trusts are not thereby declared, no trust afterwards declared by a paper not executed as a Will can be binding: in such a case the legatee will be a trustee for those entitled under the Statute of Distributions (*e*).

Trusts not appearing on face of Will, but communicated to and accepted by legatee, enforced as binding on his conscience

There are cases where no trust appears on the face of the Will, but the testator has been induced to make the Will or, having made it, has been induced not to revoke it by a promise on the part of the legatee to deal with the property in a specified manner: in these cases the Court treats the trust as binding on the conscience of the donee (*f*). The communication to the trustee of the object of the trust may be after the date of the Will (*g*), but it is essential, in order to make the trust binding, that it shall be communicated to the legatee in the testator's lifetime, and that he should accept that particular trust (*h*). Vice-Chancellor Hall, in his judgment in *Re Fleetwood* (*i*),

(*a*) *Langham* v. *Sanford*, 17 Ves. 443; *Whitaker* v. *Tatham*, 7 Bing. 628. But see *Williams* v. *Jones*, 10 Ves. 77, as to one of several executors.

(*b*) *Langham* v. *Sanford*, 17 Ves. 443; *Hall* v. *Hill*, 1 Dr. & W. 115, *per* Sugden, C. of Ireland; *Barrs* v. *Fewkes*, 11 Jur. N. S. 669.

(*c*) *Ante*, p. 1218.

(*d*) *Love* v. *Gaze*, 8 Beav. 472. See also *Briggs* v. *Penny*, 3 De G. & Sm. 525.

(*e*) *Johnson* v. *Ball*, 5 De G. & Sm. 85; *Briggs* v. *Penny*, 3 Mac. & G. 546; *Singleton* v. *Tomlinson*, 3 A. C. 404.

(*f*) *McCormick* v. *Grogan*, L. R. 4 H. L. 82. See *ante*, p. 304, note (*z*); *Re Stead*, [1900] 1 Ch. 237.

(*g*) *Moss* v. *Cooper*, 1 J. & H. 352; *Re Stead*, *ubi supra*.

(*h*) *Re Boyes*, 26 C. D. 531; *Re Pitt Rivers*, [1902] 1 Ch. 403.

(*i*) 15 C. D. 594.

refuses to accept *Att.-Gen.* v. *Dillon* (*k*) and *McCormick* v. *Grogan* (*l*), as establishing contrary to the authorities mentioned in his judgment, that where the trust is referred to on the face of the Will, the Court will not give effect to the intended trust, although there is conclusive evidence upon which the Court would have given effect to the intended trust had the Will been altogether silent as to the trust. The judgment of the Vice-Chancellor is difficult to reconcile with the cases cited in note (*e*), p. 1224, but whether or not the principle, which led Courts of Equity to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, applies to cases where the Will shows some trust was intended, as well as to those where this does not appear, it seems clear that in either case the trust must be definite, communicated to the legatee and accepted by him. The judgment in the case of *Riordan* v. *Banon* (*m*) assumes that a Court of Equity will enforce the trust in favour of the person for whose benefit the legatee accepted the trust, even though the legatee make no claim to take the property beneficially; for although no doubt the fraud would be of a different kind, if the legatee could by means of it retain the benefit of the legacy for himself, yet it would also be a fraud, though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary donees. In *Re Fleetwood* (*n*), Vice-Chancellor Hall held that one of the witnesses to the Will being interested under the parol trust such interest failed, but if the trust was enforced not under the Will but to prevent the Wills Act being used for fraud, the decision would seem difficult to support.

Parol trusts not enforced in favour of witness to Will.

It may be mentioned, in conclusion of this subject, that where there is no gift of the undisposed of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it. Thus, where a testator, by his Will, cut off his widow and one of his daughters from any part of his property, and directed that they should not receive any benefit therefrom, *but he made no disposition of his property;* it was held that the widow and daughter were, nevertheless, entitled to their share in the undisposed of residue, under the Statute of Distributions (*o*).

If the residue be undisposed of, it must be divided amongst all the next of kin, notwithstanding the testator declares by his Will that one of them shall have none of his property.

(*k*) 13 Ir. Ch. Rep. 127.

(*l*) L. R. 4 H. L. 82.

(*m*) 10 Ir. Eq. Rep. 649.

(*n*) 15 C. D. 594.

(*o*) *Johnson* v. *Johnson*, 4 Beav. 318. But see *Bund* v. *Green*, 12 C. D. 819.

BOOK THE FOURTH.

OF DISTRIBUTION.

THE office of an administrator, as far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor: But as there is no Will (unless the administration be *cum testamento annexo*) to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses (*a*).

CHAPTER THE FIRST.

OF DISTRIBUTION UNDER THE STATUTE 22 & 23 CAR. II. C. 10.

AFTER the Ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner mentioned in the preceding part of this Treatise (*b*), to delegate such authority to the relations of the deceased, the Spiritual Court attempted to enforce a distribution, and took bonds of the administrator for that purpose: But such bonds were prohibited by the Temporal Courts, and declared to be void in point of law, on the ground, that by the grant of administration, the ecclesiastical authority was executed, and ought to interfere no further (*c*). Thus the administrator was entitled, exclusively, to enjoy the residue of the testator's effects, after payment of the debts and funeral expenses (*d*).

(*a*) Toller, 369.

(*b*) *Ante*, p. 314.

(*c*) *Edwards* v. *Freeman*, 2 P. Wms. 441, by Sir Joseph Jekyll; *Hughes* v. *Hughes*, 1 Lev. 233; *S. C.*, Carter, 125; 2 Black. Comm. 515; Toller, 370.

(*d*) *Carter* v. *Crawley*, Sir T. Raym. 500; *Edwards* v. *Freeman*, 2 P. Wms. 441; 2 Black. Comm. 515; Bac. Abr. Exors. (I.).

The hardships of this privilege upon those of kin to the intestate in equal degree with the administrator was the occasion of the passing of the Statute of Distributions, 22 & 23 Car. II. c. 10 (*e*). That statute, after empowering the Ordinary, on the granting of administration, to take a bond of the administrator, with two or more sureties, conditioned as before mentioned in a preceding part of this Work (*f*), proceeds, in sect. 3, to enact as follows, "And also that the said Ordinaries and Judges respectively shall and may and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and, upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral, and just expenses of every sort first allowed and deducted), amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws; saving to every one, supposing him or themselves aggrieved, their right of appeal, as was always in such cases used."

22 & 23 Car. II. c. 10. Statute of Distributions;

Sect. 3. Ordinaries to have power to call administrators to account, and to make distribution, &c.

It has already appeared (*g*), that by reason of the Court of Probate Act, 1857, s. 23, that Court (whose jurisdiction was substituted for that of the Ordinary and other Ecclesiastical Judges) could not entertain a suit for the distribution of residue. But the Court of Equity compelled the administrator to apply it according to the statute. And now, although the Probate Division probably has jurisdiction to entertain an administration action, yet it would probably refuse to do so, since by sects. 33, 34 of the Judicature Act, 1873, all causes and matters for the administration of the estates of deceased persons are assigned to the Chancery Division.

By sect. 4 of the Statute of Distributions, it is provided, "That this Act or anything herein contained shall not any

Sect. 4. Customs of London and York saved.

(*e*) *Petit* v. *Smith*, 1 P. Wms. 8, by Lord Holt. There are two objects of that statute: one that the residue shall be forthcoming, and another that it shall be duly divided: by Bayley, B., in *The Archbishop of Canterbury* v. *Robertson*, 1 Cr. & M. 529.

(*f*) *Ante*, p. 420 *et seq.*

(*g*) *Ante*, p. 210.

ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places having known and received customs peculiar to them, but that the same customs may be observed as formerly: anything herein contained to the contrary notwithstanding." This section was repealed by 19 & 20 Vict. c. 94, which provides that the special customs concerning the distribution of the personal estate of intestates observed in the city of London, and in the province of York and certain other places, shall, with reference to all persons dying on or after the 1st day of January, 1857, wholly cease and determine (*h*).

Sect. 5. How and to whom the surplusage is to be distributed:

By sect. 5 of the Statute of Distributions, it is further enacted, "That all Ordinaries, and every other person (*i*), who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share, which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of

Advancement by portion:

Heir-at-law to have an equal part.

(*h*) See *post*, p. 1272.

(*i*) The word "person" here evidently means judge. See *Archbishop of Canterbury* v. *Tappen*, 8 B. & C. 158, by Lord Tenterden.

the value of the land which he hath by descent or otherwise from the intestate."

Sect. 6. If no children.

And by sect. 6, "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them" (*k*).

Sect. 7. If no wife or if no wife or child.

And by sect. 7, it is provided, "That there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

Sect. 8. No distribution till after a year: If debts afterwards appear, then all to refund proportionably.

And by sect. 8, it is likewise enacted, "To the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death, and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said Courts, that if any debt or debts, truly owing by the intestate, shall be afterwards sued for, and recovered or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the debt or debts so discovered after the distribution made as aforesaid."

Sect. 9. Act not to extend to administration *cum testamento annexo.*

Finally, by sect. 9, it is enacted, "That in all cases where the Ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the Will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made."

It is obvious how near a resemblance this Statute of Distributions bears to the ancient English law *de rationabili parte bonorum;* which Sir Edward Coke, though he doubted the

(*k*) As to the modification of this section made by the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, see *post*, p. 1232.

generality of its restraint on the power of bequeathing by Will, held to be universally binding, in point of conscience at least, on the administrator or executor, in case of either a total or partial intestacy (*l*). It also bears some resemblance to the Roman law of succession *ab intestato*, which, and because the Act was also penned by an eminent civilian (*m*), has occasioned a notion that the Parliament of England copied it from the Roman Prætor; though it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom, from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the Western parts of Europe (*n*).

Lord Hardwicke, in the case of *Stanley* v. *Stanley* (*o*), took occasion to observe, that this statute was very incorrectly penned.

Agreement as to distributive share.

Where a party, entitled to a distributive share of the personal estate of an intestate, makes an agreement relating to the distribution, under a supposition that the estate is of a certain value, and it turns out to be greater than was known at the time of the agreement, a Court of Equity will set it aside (*p*): for it is a general principle of equity, that agreements, relative to real or personal estate, if founded on mistake, will be for that reason set aside (*q*).

In the investigation of the rights of the several parties entitled under this statute, it is proposed to consider, First, The rights of a husband, with respect to the personal property of his deceased wife: Secondly, The rights of a widow, with respect to the effects of her husband: Thirdly, The rights of the children, and lineal descendants of the deceased: Fourthly, The rights of the next of kin.

(*l*) 2 Inst. 32, 33; 2 Black. Com. 516.

(*m*) Sir Walter Walker. See *R.* v. *Raines*, 1 Lord Raym. 574, by Lord Holt.

(*n*) 2 Black Com. 516.

(*o*) 1 Atk. 457.

(*p*) *Cocking* v. *Pratt*, 1 Ves. Sen. 400.

(*q*) See *Pooley* v. *Ray*, 1 P. Wms. 355; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; *Leonard* v. *Leonard*, 2 Ball & Beat. 183; *Stewart* v. *Stewart*, 1 Rob. App. Cas. 431. But see also *Stone* v. *Godfrey*, 5 De G. M. & G. 76, 90, *per* Turner, L. J.

SECTION I.

Of the Rights of the Husband and his Representatives, with respect to the Personal Property of his intestate Wife.

Husband's rights as administrator to his wife:

It has been shown, in a former part of this Treatise, that the husband is entitled to the grant of administration of his wife's effects; and consequently, before the Statute of Distributions, he was entitled, as all administrators were, to the exclusive enjoyment of the residue: Doubts, however, arose, whether the husband's right was not superseded by the force of that statute; and whether he was not thereby bound to distribute her personal estate among her next of kin: To obviate which, it is provided by the 29 Car. II. c. 3, s. 25 (the Statute of Frauds), that neither the Statute of Distributions nor anything therein contained "shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act" (*r*).

rights of the husband's representatives, if he dies without taking out administration to her:

In case the wife dies intestate, and afterwards the husband dies, without having taken out administration to her, the Ecclesiastical Court, until a late period, considered itself bound by the statute 21 Hen. VIII. c. 5, to grant administration to the next of kin of the wife, and not to the representative of the husband (*s*). But such administrator was regarded, in equity, with respect to the residue, as a trustee for the representatives of the husband (*t*): For the husband surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of his wife but himself; so that her whole property belonged to him (*u*). And the practice of the Prerogative Court of Canterbury, on this head, was altered in Sir John Nicholl's time; and the rule established was, that the administration shall be granted to the

(*r*) See *ante*, p. 654 *et seq.*, as to the extent of the husband's rights as his wife's administrator. See also *ante*, p. 528.

(*s*) See *ante*, p. 322.

(*t*) *Cart* v. *Rees*, 1 P. Wms. 381 (cited in *Squib* v. *Wyn*); *Humphrey* v. *Bullen*, 1 Atk. 458; *S. C.*, 11 Vin. Abr. 88; *Elliott* v. *Collier*, 3 Atk. 526; *S. C.*, 1 Ves. Sen. 15; 1 Wils. 168.

(*u*) *Elliott* v. *Collier*, 3 Atk. 527.

representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest (*x*).

or without having fully administered.

So in a case where the husband takes out administration to his wife, and dies without having administered to all her estate, the Ecclesiastical Courts, for a long period, thought themselves obliged to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death (*y*): Still the beneficial interest in her effects has always been held to be in the representatives of her husband (*z*).

It may be a question, what shall constitute the legal relations of husband and wife, so as to confer the rights above discussed: This subject has already been considered, incidentally to the investigation of the husband's right to the administration (*a*).

SECTION II.

Of the Rights of a Widow, in the Distribution of the Effects of her intestate Husband, under the Statute.

The Statute of Distributions, it will be observed, provides, that if the intestate leaves children, as well as a widow, one-third shall go to the widow, and the residue among the children. If there be no children or lineal descendants of children subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred. But the Statute of Distributions has been materially modified in favour of the widow of an intestate dying without issue by the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, an Act to amend the law by making better provision for the widows of certain intestates in the distribution of such intestates' property. This Act provides: Sect. 1. "The real and personal estates of every man who shall die intestate (*aa*) after the 1st of September, 1890, leaving a widow but no issue (*b*) shall, in all cases where the net value of such real and personal estates shall not exceed 500*l.*, belong to his widow absolutely and exclusively.

Intestate's estate not exceeding 500*l.* to belong to widow where no issue.

(*x*) See *ante*, p. 323.

(*y*) *Ante*, p. 383.

(*z*) *Humphrey* v. *Bullen*, 1 Atk. 458.

(*a*) *Ante*, pp. 319, 325.

(*aa*) The Act only applies to the case of a man dying wholly intestate; it does not, like the Statute of Distributions, apply to cases of partial intestacy: *Re Twigg's Estate*, [1892] 1 Ch. 579.

(*b*) "Issue" would seem to include descendants of every degree.

Sect. 2. "Where the net value of the real and personal estates, in the preceding section mentioned, shall exceed the sum of 500*l.*, the widow of such intestate shall be entitled to 500*l.*, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such 500*l.*, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

Intestate's estate exceeding 500*l.*, widow to have a charge for 500*l.*

Sect. 3. "As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.

How charge to be borne as between realty and personalty.

Sect. 4. "The provision for the widow, intended to be made by this Act, shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of 500*l.*, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed (*c*).

Above provision to be in addition to share of residue.

Sect. 5. "The net value of such real estates as aforesaid shall, for the purposes of this Act, be estimated in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate, as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the Statute 16 & 17 Vict. c. 51, and in the case of an estate for a life or lives according to the said tables and rules.

How realty to be valued.

Sect. 6. "The net value of such personal estates as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral, and testamentary expenses (*d*) of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject."

How personalty to be valued.

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of the personal estate; but,

(*c*) Dower out of real estate of an intestate is subject to abatement in respect of the widow's charge of 500*l.* imposed by this Act: *Re Charriere*, [1896] 1 Ch. 912.

(*d*) The phrase "testamentary expenses" is a slip of draftsmanship, and means the expenses of obtaining letters of administration and of administration generally: *Re Twigg's Estate*, [1892] 1 Ch. 579, 582, *per* Chitty, J.

subject to her rights under the Intestates' Estates Act, 1890, one moiety belongs to her, and the other to the Crown (*e*).

Widow's claim may be barred by settlement.

The widow's title, however, under the Statute of Distributions, may be barred by a settlement before marriage (*f*), excluding her from her distributive share of her husband's personal estate; and even in the case of a female infant, she may be barred of her right by such a settlement, made before marriage, with the approbation of her parents or guardians (*g*).

Where the settlement is expressed to be "as and for her jointure, in full lieu, bar and satisfaction of any dower or *thirds* which she could or might claim *at common law* out of all or any of the estates real, *personal*, or freehold, of her intended husband," the widow will be excluded from her share under the statute; for the words "common law" must be construed as equivalent to the terms "according to the general law" (*h*).

In such cases, whether the husband die intestate, or dispose of his personal estate by Will, which disposition fails by lapse, the wife will be equally excluded from her distributive share.

(*e*) *Cave* v. *Roberts*, 8 Sim. 214; *In the goods of Bryant*, [1896] P. 159, where a widow died without taking administration to her husband's estate (which was of the net value of under 500*l.*, and, as he died without issue, belonged exclusively to her under sect. 1 of the Act of 1890), the Court granted administration to her executor under sect. 73 of the Court of Probate Act, 1857, notwithstanding the possibility of the intestate husband's estate proving afterwards to be of more value than 500*l.*

(*f*) See *Slatter* v. *Slatter*, 1 Younge & Coll. 28, as to the effect of a separation deed executed by the wife after marriage.

(*g*) *Lord Buckinghamshire* v. *Drury*, 3 Bro. P. C. 492; 4 Bro. C. C. 505, note; 2 Roper on Husb. & Wife, 26, 2nd edit. But see observations of Lord Herschell in *Seaton* v. *Seaton*, 13 A. C. at p. 67.

(*h*) *Gurly* v. *Gurly*, 8 Cl. & F. 743. See also *Druce* v. *Denison*, 6 Ves. 385. But where the husband, on his marriage, settles on the wife a rent-charge *for her jointure, and in lieu of dower and thirds at common law*, she is not thereby precluded from her distributive share in his undisposed-of personal estate; because the rent-charge must be regarded as intended to be in lieu only of any claim she might have *on his lands: Colleton* v. *Garth*, 6 Sim. 19. The word "thirds," however, is not confined to real estate, but is a general expression which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether real or personal, of her deceased husband; and in construing the instrument the Court considers, *inter alia*, the fund out of which the provision for the wife was made: *Thompson* v. *Watts*, 2 Johns. & H. 291.

But it is otherwise when the husband *by Will* makes a provision for his wife, stating it to be in lieu and in bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the Will, the widow is entitled to a share under the statute (*i*): The principle of this distinction is, that where a woman has before marriage agreed to accept a consideration for her widow's share, she is bound by her compact, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's Will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator, viz., for the benefit of the person in favour of whom the property was bequeathed by him; so that if the purpose be disappointed, there is no reason why the bar or exclusion should continue (*k*).

Provision by Will for widow, in lieu of her thirds, does not bar her claim under a *quasi* intestacy.

It is necessary to consider the right of the widow under the Statute of Distributions, with relation to the existence of a covenant or agreement, on the part of the husband, to settle or to leave, or that his executors shall pay, to his widow, a portion of his personal estate.

In what case a widow cannot claim both her distributive share and money due under a covenant for her provision:

It is a general rule, that if the husband covenants to *leave*, or that his executor shall *pay*, to his widow a sum of money, or part of his personal estate, and he dies intestate, so that she becomes entitled to a portion of his personal property under the statute, such distributive share shall be a performance of the covenant, and she cannot claim both (*l*). The principle seems to be, that

(*i*) *Pickering* v. *Stamford*, 3 Ves. 332; *Garthshore* v. *Chalie*, 10 Ves. 17, 18; 2 Rop. Husb. & Wife, 23, 2nd edit. Cf. *Naismith* v. *Boyes*, [1899] A. C. 495.

(*k*) 2 Rop. Husb. & Wife, 23, 2nd edit. Lord Alvanley found this principle recognized by Lord Cowper, in *Sympson* v. *Hornsby*, which he stated from the Registrar's Book: *Pickering* v. *Stamford*, 3 Ves. 335. But this principle cannot be applied to a case where, on the face of the Will there is an intestacy, with language excluding the widow in absolute and comprehensive terms from any further share: *Lett* v. *Randall*, 3 Sm. & G. 83.

(*l*) *Blandy* v. *Widmore*, 1 P. Wms. 324; *Lee* v. *Cox and D'Aranda*, 1 Ves. Sen. 1; *Garthshore* v. *Chalie*, 10 Ves. 1. It will make no difference that the money under the covenant is to be paid at a determinate period within the year after the testator's death, whereas in strictness the distributive share is not payable until the end of that year; for this difference shall not be permitted to repel the legal presumption: *ibid.* 13.

the husband, looking forward to the event of his death, when his wife will have an interest in his property by the provision of the law, declines for that reason to give her any interest in it in his lifetime, considering that his covenant will be as effectually performed by what the law provides for her, as if the provisions were made by himself (*m*).

If the widow's distributive share is *less* than the amount of her provision under her husband's covenant, such share will be regarded as a partial performance; so that if the money covenanted to be paid by the husband's executors be 1,000*l.*, and the widow's distributive share amount only to 500*l.*, such share will nevertheless be a part performance of the covenant; viz., to the extent of 500*l.* (*n*).

In the case of *Goldsmid* v. *Goldsmid* (*o*), Sir Thomas Plumer, M. R., decided, that if the widow takes a distributive share of her husband's personal estate, not under an actual but a *quasi* intestacy, such share will be a performance of his covenant that his executors shall pay to her a sum of money at his death if she survived him: In that case the husband by marriage articles covenanted, that if he died in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3,000*l.*: By his Will he gave all his property to his executors, in trust after payment of his debts, at the expiration of three years from his decease, to divide it in such ways, shares and proportions, as to them should appear right: On his death, during the life of his wife, the executors having died or renounced, the property became divisible according to the Statute of Distributions: And the widow's distributive share, exceeding 3,000*l.*, was held a performance of the covenant in the marriage articles (*p*).

in what cases she may claim both.

If the husband's covenant be entire, and the provision therein expressed to be secured to the wife is such as the covenant in *part* might be held to be performed by the widow's distributive share under the statute, according to the preceding cases, and the remaining part could not be so considered, then, since the

(*m*) *Garthshore* v. *Chalie*, 10 Ves. 1, 16.

(*n*) *Ibid.* 16.

(*o*) 1 Swanst. 211.

(*p*) The authority of this decision is doubted in 2 Rop. Husb. & Wife, 50, 2nd edit.; but the editor of the 2nd edit. of Roper in note (*b*), p. 50, questions the soundness of his author's reasoning. The case is referred to with approval in *Bannatyne* v. *Ferguson*, [1896] 1 I. R. 161.

covenant is entire, the Court will not split it, and hold a performance and a non-performance at the same time (*q*): Thus, if the husband covenanted with trustees that his heirs, executors, &c., should pay to them 6,000*l.*, within a certain period after his death, upon trust as to 1,500*l.*, part of the sum, for his widow *absolutely*, if she survived him; and as to the remaining sum of 4,500*l.*, to pay the interest of it to her during her life, or widowhood; since the last sum, not being given absolutely to the widow, cannot be considered satisfied by her distributive share, neither shall the 1,500*l.* be so regarded (*r*).

Again, if the covenant by the husband be so framed as to require the money to be settled during his life, so that there was a breach of it before his death, and a *debt* may be considered as incurred to the widow, in such case the rule above laid down does not apply. Thus, in *Oliver* v. *Brickland* (*s*), the husband covenanted to pay for the benefit of his wife a sum of money within two years after the marriage, and that if he died, his executors should pay it: After surviving the two years, he died intestate, and his widow's distributive share was larger than the sum covenanted to be settled upon her: But Sir Joseph Jekyll decided, that it should not be taken in satisfaction of such debt, but that the widow should have both.

SECTION III.

Of the Rights of the Children and their Representatives to Distribution under the Statute.

After the allotment of a third to the widow, the statute, as we have seen, directs a distribution of the residue by equal portions to and amongst the children of the intestate, and "such persons as legally represent such children in case any of the said children be then dead." In case there be no wife, then, by sect. 7, all the estate is to be distributed to and amongst the children (*t*).

(*q*) 2 Rop. Husb. & Wife, 51, 2nd edit.

(*r*) *Couch* v. *Stratton*, 4 Ves. 391. On the authority of this case, a similar question was reluctantly decided accordingly, by Wigram, V.-C., in *Salisbury* v. *Salisbury*, 6 Hare, 526.

(*s*) Cited in *Lee* v. *Cox and D'Aranda*, 3 Atk. 420; 1 Ves. Sen. 1; *Lang* v. *Lang*, 8 Sim. 451.

(*t*) A child legitimate by the law of its father's domicil, but illegitimate according to English law, is

What is meant by the "legal representatives" of the children.

By the words "such as legally represent such children," their lineal representatives to the remotest degree are admitted (*u*). But the term must be understood of descendants, and not next of kin (*x*); as for example, if a son of the intestate is dead, leaving a widow and child, the widow shall take nothing, and the child the whole of the father's share; yet the widow, though not strictly one of the next of kin, is in the same sense as the child a legal representative of the personal estate of the father (*y*).

To attain a clear apprehension of the subject of this section, three sorts of cases may be supposed: First, where none of the intestate's children are dead; secondly, where the intestate's children are all dead, all of them having left children; thirdly, where some of the intestate's children are living and some dead, and such as are dead have each of them left children (*z*).

1. Where none of the intestate's children are dead:

On the first hypothesis, that is to say, where none of the intestate's children are dead, it is sufficiently obvious, that after the wife has had the third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate; as in this case they all claim in their own right (*a*).

half-blood:

A brother or sister of the half-blood shall be equally entitled to a share with one of the whole blood; inasmuch as they are both equally near of kin to the intestate (*b*).

posthumous child:

A posthumous child has also the same rights; for a child *en ventre sa mère* at the time of the father's death, being a person *in rerum naturâ*, is, by the rules of the common and the civil law, to all intents and purposes a child, as much as if born in the father's lifetime (*c*), and consequently is entitled under the statute.

entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England under the Statute of Distributions: *Re Goodman's Trusts*, 17 C. D. 266 (reversing the decision of Jessel, M. R., 14 C. D. 619, and disapproving *Boyes* v. *Bedale*, 1 H. & M. 798). Cf. also *Re Andros*, 24 C. D. 637.

(*u*) *Carter* v. *Crawley*, Sir T. Raymond, 500.

(*x*) *Bridge* v. *Abbott*, 3 Bro. C. C. 226, by Lord Alvanley; *Evans* v. *Charles*, 1 Anstr. 132, by Eyre, C. B.

(*y*) *Price* v. *Strange*, 6 Madd. 161, 162.

(*z*) Toller, 374.

(*a*) *Ibid.*

(*b*) *Smith* v. *Tracey*, 1 Mod. 209; Toller, 374; *Watts* v. *Crooke*, Show. P. C. 4th edit. 139; and see *ante*, p. 331.

(*c*) *Wallis* v. *Hodson*, 2 Atk. 117; *Burnet* v. *Mann*, 1 Ves. Sen. 156;

an only child.

If the intestate leave only one child, such case is not to be considered as omitted by the statute: therefore, in case the intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child (*d*). And where the intestate leaves an only child and no widow, although literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate (*e*).

2. Where all the intestate's children are dead, all having left children.

Secondly, where the intestate's children are all dead, all of them having left children. Notwithstanding what is stated by Toller and other authorities referred to in the 9th Edit. of this Work (*f*), it has been decided that such descendants take *per stirpes* and not *per capita* (*g*).

Toller, 374. See also *post*, p. 1251, note (*d*). A child *en ventre sa mère* is to be deemed living, even though by such construction no benefit passes directly to the child, but only to the mother or father. See *Re Burrows, Cleghorn* v. *Burrows*, [1895] 2 Ch. 497, where the dictum of Lord Eldon in *Thellusson* v. *Woodford*, 11 Ves. 112, 149, commenting on the case of *Gulliver* v. *Wickett*, 1 Wils. 105, was discussed and followed. The case of *Blasson* v. *Blasson*, 2 De G. J. & Sm. 665, turned on the words "born and living," which seem to show that the testator contrasted birth with life. But in his judgment at p. 670 Lord Westbury says that "the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to, and that is limited to cases where *de commodis ipsius partûs quæritur*." However, in *Re Wilmer's Trusts*, [1903] 1 Ch. 874, 888, Buckley, J., after considering the authorities, said, "In my judgment, therefore, the doctrine in question, by which a child *en ventre sa mère* is to be treated as existing for many purposes—for all purposes other than descent at common law as regards rents during the intermediate period—is one which is applicable, not only where it is to the advantage of the child to apply it, or where it is immaterial to the child whether it is applied or not, but also where it is to the disadvantage of the child to apply it. It appears to me that the doctrine is a general one." The decision in this case was affirmed by the Court of Appeal, [1903] 2 Ch. 411.

(*d*) *Brown* v. *Farndell*, Carth. 52; Bac. Abr. tit. Exors. I. 5.

(*e*) *Davers* v. *Dewes*, 3 P. Wms. 49, note (D); *Palmer* v. *Gerrard*, Prec. Chan. 21.

(*f*) *Walsh* v. *Walsh*, 1 Eq. Ca. Abr. 249, pl. 7; *Bowers* v. *Littlewood*, 1 P. Wms. 595, by Lord Parker; *Davers* v. *Dewes*, 4 P. Wms. 50, by Lord King; Bac. Abr. Exors. I. 3; Toller, 374.

(*g*) *Lockyer* v. *Vade*, Barnardiston, Ch. 444 (Lord Hardwicke); *Re Ross's Trust*, L. R. 13 Eq. 286 (Wickens, V.-C.); *Re Natt*, 37 C. D. 517 (North, J.); *Valentine* v. *Fitzsimmons*, [1894] 1 I. R. 94 (Porter, M. R.). See also note of Mr. Joshua Williams in the 4th edit. of Watkins on Descents, p. 259,

3. Where some of the intestate's children are dead, having left children.

Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children. In this case, the children of the deceased children take *per stirpes*, that is to say, not in their own right, but by representation. Thus, for example, if a father have three children, John, Mary, and Henry, and John die, leaving four children, and Mary die, leaving two, and Henry alone survive the father; on the death of the father intestate, one-third shall be allotted to Henry, one-third to John's four children, and the remaining third to Mary's two children; for these grandchildren are entitled as representing their respective parents (*h*).

Advancement: Exclusion of such children as have any land by settlement or have been advanced by portion:

The end and intent of the statute was to make the provisions for all the children of the intestate equal, as near as could be estimated (*i*). Accordingly, the 5th section of the statute proceeds to provide, that no child of the intestate, except his heir-at-law, who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so shall be allotted to him or her (*k*).

This just and equitable provision has been also said to be derived from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in others: But it may not be amiss to observe, that with regard to goods and chattels, this was part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland; and with regard to the lands descending in co-

and Mr. Hargrave's Jurisconsult Exercitations, Vol. I., p. 271, referred to in the judgment of North, J., in *Re Natt, ubi supra.* The question depends on the construction of the statute. The view of these learned judges necessitates the application of the 5th section of the statute to a case where the intestate leaves no living children, but only legal representatives of such children, and the reading of the word "child" in the 7th section as meaning "child living either in person or in its descendants." This view also seems to involve reading the word "and" in the 2nd paragraph of the 5th section, where it follows the words "amongst the children of such persons dying intestate," as meaning "or."

(*h*) Bac. Abr. tit. Exors. I. 3; Toller, 374.

(*i*) *Edwards* v. *Freeman*, 2 P. Wms. 439, 440, by Sir Joseph Jekyll.

(*k*) 2 Black. Com. 516.

parcenary, that it has always been, and still is, the common law of England, under the name of *hotchpot* (*l*).

This provision applies only to the distribution of the estates of intestate *fathers:* And therefore if a mother being a widow advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotchpot: This was decided by Lord King, C., on the principle, that the statute was grounded on the custom of London, which never affected a widow's personal estate, and that the Act seems to include those alone within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only (*m*).

The statute takes nothing away that has been given to any of the children, however unequal that may have been: How much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received: This manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality (*n*).

The provision of sect. 5 of the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete Will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them (*o*). The provision, however, applies to an

(*l*) 2 Black. Com. 517; *post*, p. 1243, n. (*b*). "It seemeth," says Littleton (sect. 267), "that this word 'Hotchpot' is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together": 2 Black. Com. 190. See *Fox* v. *Fox*, L. R. 11 Eq. 142; *Hewitt* v. *Jardine*, L. R. 14 Eq. 58; *Limpus* v. *Arnold*, 15 Q. B. D. 300, as to the effect of a hotchpot clause in a Will.

(*m*) *Holt* v. *Frederick*, 2 P. Wms. 357; *Bennet* v. *Bennet*, 10 C. D. 474.

(*n*) By Lord Raymond, in *Edwards* v. *Freeman*, 2 P. Wms. 443.

(*o*) By Sir W. Grant in *Walton* v. *Walton*, 14 Ves. 324; *Edwards* v. *Freeman*, 2 P. Wms. 440, 446; *Stewart* v. *Stewart*, 15 C. D. 539, 543. Sir W. Grant adds to his statement as contained in the above text: "Therefore the child advanced by her father in his life could not be called on to bring her share into hotchpot." But it was pointed out by Jessel, M. R., in *Stewart* v. *Stewart*, 15 C. D. at p. 543, that the law is different from what it was supposed to be in Sir William Grant's time, which was that advancement did not apply to a share of residue. Whenever the executor is to be deemed trustee for children as persons entitled under the Statute of Distributions, in respect of any residue not expressly disposed of (see 1 Will. IV. c. 40, *ante*, p. 1218),

intestacy occasioned by a Will becoming wholly inoperative in consequence of the death of the sole executor and legatee in the lifetime of the testator, as well as to an intestacy occasioned by the non-existence of any Will (*p*).

If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had, if living (*q*).

Advances were formerly chargeable with interest at 4 per cent. from the testator's death (*r*), but it would seem that the proper rate now is 3 per cent. (*s*).

A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow (*t*).

since the children take in the same shares and in the same way as they would have taken under the statute, there seems no good reason, in ascertaining the shares in which they take, to disregard the provisions of the statute as to taking into account advances. Buckley, J., in *Re Ford*, [1902] 1 Ch. 218, 222 (affd. on appeal, [1902] 2 Ch. 605), says: "I confess I have a great difficulty in seeing how, if you are to apply the statute at all, you can do so and not give to a child that which the statute gives it, namely, an equal share or such sum as, with an advance made in the testator's lifetime, will make up a share equal to the other children."

(*p*) *Re Ford, ubi supra.*

(*q*) *Proud* v. *Turner*, 2 P. Wms. 560. In *Re Scott*, [1903] 1 Ch. 1, the same principle was held to apply to the case of a gift over by Will to grandchildren of the share of a child dying in the testator's lifetime, since the grandchildren could take only that which their parent would have taken.

(*r*) *Stewart* v. *Stewart*, 15 C. D. 539.

(*s*) *Re Whiteford*, [1903] 1 Ch. 889, 895, *per* Buckley, J. "The principle, I apprehend, is that when one person is paid before another you charge him with interest at the rate which you apprehend he would have obtained if he had had the money and invested it. In ascertaining what that rate is, you ought to give him the credit of being a person of reasonable prudence and caution and not a rash investor. The reasonable rate to be charged is that which he could command by making an investment without undue risk. The recipient of the advance is not to be treated as a wrong-doer or as a person who will not act with reasonable prudence. It seems to me that 3 per cent. is the rate which ought to be charged. The rule as to 3 per cent. has been followed in several cases—in *In re Goodenough*, [1895] 2 Ch. 537, in applying the rule in *In re Earl of Chesterfield's Trusts*, 24 C. D. 643; in *In re Barclay*, [1899] 1 Ch. 674, in charging trustees with sums received and retained by them; and in *Rowlls* v. *Bebb*, [1900] 2 Ch. 107, as between tenant for life and remainderman." Cf. *ante*, p. 1123, n. (*m*).

(*t*) *Kircudbright* v. *Kircudbright*,

It will be convenient to consider this subject further: 1. With respect to children who have any land by settlement of the intestate. 2. With respect to children who have been advanced by pecuniary portions.

1. Children who have land by settlement:

The statute extends not only to land, freehold and copyhold, settled on a younger child by the father, but also to charges upon land for such child (*u*): So if a father settle a rent out of his lands on a younger child, this is within the statute (*x*): and so is a reversion settled on any child but the heir (*y*).

Land claimed by marriage settlement has been held an advancement within the statute: but land devised by the father to a younger child is not to be so considered: for a provision to be brought into hotchpot must be such as is made by an act in the intestate's lifetime, and not by Will (*z*).

In respect to Borough-English lands, which descend to the youngest son, it was once held that he should allow for them, on the ground that the statute intended merely to provide for the heir of the family, that is, the heir by the common law, and not one who is heir only by custom in some particular places (*a*). But that decision has been overruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children, without regard to this species of estate; for although the exception in the statute extends only to the eldest son, yet no law exists to oblige the heir in Borough-English to bring in his lands: The statute contains no such requisition: It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime (*b*).

Money laid out by the intestate on repairs of houses, which had been given, but not conveyed, by him to his eldest son, and which had therefore descended on him as heir-at-law, has been held not to be an advancement to be brought into hotchpot

8 Ves. 51, 64. So too if a Will contains a hotchpot clause, *primâ facie* the widow cannot claim any benefit thereunder against the children: *Stewart* v. *Stewart*, 15 C. D. 539. See also *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670.

(*u*) By Sir Joseph Jekyll, *Edwards* v. *Freeman*, 2 P. Wms. 441.

(*x*) *Ibid.*

(*y*) *Ibid.* 442.

(*z*) By Sir J. Jekyll, *ibid.* 440; *Twisden* v. *Twisden*, 9 Ves. 425, 462, by Lord Eldon.

(*a*) By Sir J. Jekyll, M. R., in *Pratt* v. *Pratt*, 2 Stra. 935.

(*b*) By Lord Talbot in *Lutwyche* v. *Lutwyche*, Cas. temp. Talb. 279. As to whether a coparcener is bound to bring land into hotchpot, see *Dillon* v. *Coppin*, 4 M. & Cr. 647; and see *ante*, p. 1241.

under the statute: though it would have been otherwise if the father in his lifetime had irrevocably parted with the estate by a conveyance to the son, and afterwards given him a sum of money to ameliorate it (*c*).

2. Children who have been advanced by pecuniary portions:

2. With regard to children who have been advanced by pecuniary portions. By the provisions of the statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise from the intestate, yet if he hath had any advancement from his father out of his personal estate, he shall abate for it in the same manner as the other children (*d*): And were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (*e*). Co-heiresses shall also, it seems, bring in such advancement, not being land (*f*), as they may have respectively received from their father, before they shall be entitled to their distributive share; agreeably to the principle of the Act, and to the object of a just and impartial father to promote an equality among his children (*g*).

what is considered an advancement out of the personal estate:

It remains to consider what is, and what is not, to be regarded as an advancement out of the personal estate of the father, so as to exclude a child from a distributive share of the whole or part of the residue.

A provision made for a child by a settlement, whether voluntary, or for a good consideration, as that of marriage, is such an advancement (*h*).

It is not requisite, to constitute an advancement, that the provision should take place in the father's lifetime (*i*). If by deed he settle an annuity, to commence after his death, on one of his children, it is an advancement (*k*). So a portion secured to the child, although *in futuro*, is an advancement (*l*). Thus a portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was held to be an advancement to her when she married, although she was

(*c*) *Smith* v. *Smith*, 5 Ves. 721.

(*d*) *Pratt* v. *Pratt*, Fitzgib. 285; Com. Dig. Admon. (H.); 4 Burn, E. L. 397, 8th edit.; *Smith* v. *Smith*, 5 Ves. 721.

(*e*) *Pratt* v. *Pratt*, Fitzgib. 285; Com. Dig. Admon. (H.); *Kircudbright* v. *Kircudbright*, 8 Ves. 51.

(*f*) See *Dillon* v. *Coppin*, 4 M. & Cr. 647.

(*g*) 4 Burn, E. L. 397, 8th edit.; Toller, 378.

(*h*) *Edwards* v. *Freeman*, 2 P. Wms. 440, 441; *Phiney* v. *Phiney*, 2 Vern. 638.

(*i*) *Edwards* v. *Freeman*, 2 P. Wms. 445.

(*k*) *Ibid.* 442; Swinb. Pt. 3, s. 18, pl. 25.

(*l*) *Ibid.* 445.

under that age, and unmarried, at the time of the intestate's death (*m*).

A portion, which was at first contingent, shall clearly be considered an advancement, when the contingency has happened (*n*). And it seems that a portion, even while contingent, being capable of valuation, may be brought into hotchpot (*o*): or the Court may order, that in case the contingency shall happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (*p*): But the contingency must be so limited as necessarily to arise within a reasonable time; as in the case stated above, where the portion was secured to the daughter, on her attaining the age of eighteen, or on her marriage (*q*).

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement; and it is not the son's estate for life only that ought to be valued, and brought into hotchpot (*r*).

With respect to the sort of benefit which shall constitute such advancement, it has been held, that if a father buy for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are to be considered as advancements, either partial or complete, according to the comparative value of the estate to be distributed (*s*). And although the office be only at will, as a gentleman pensioner's place (*t*), or a commission in the army (*u*), it is to be regarded in the same light.

An annuity is an advancement to be brought into hotchpot (*x*), or rather may be so, for an annuity is not an advancement if given by way of maintenance of an infant (*y*), viz., the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child (*z*).

(*m*) *Edwards* v. *Freeman*, 2 P. Wms. 435.

(*n*) *Ibid.* 442.

(*o*) *Ibid.* 442, 449; Toller, 377.

(*p*) *Ibid.* 446; Toller, 378.

(*q*) *Edwards* v. *Freeman*, 2 P. Wms. 440, 445, 449; Toller, 378.

(*r*) *Weyland* v. *Weyland*, 2 Atk. 635. See *Dillon* v. *Coppin*, 4 M. & Cr. 647, 669.

(*s*) *Hender* v. *Rose*, 3 P. Wms. 317, note to *Pusey* v. *Desbouverie*.

(*t*) *Norton* v. *Norton*, 3 P. Wms. 317, note.

(*u*) *Kircudbright* v. *Kircudbright*, 8 Ves. 63; *Boyd* v. *Boyd*, L. R. 4 Eq. 305; *Taylor* v. *Taylor*, L. R. 20 Eq. 155.

(*x*) Swinb. Pt. 3, s. 18, pl. 29.

(*y*) *Hatfield* v. *Minet*, 8 C. D. 136.

(*z*) *Kircudbright* v. *Kircudbright*, 8 Ves. 51.

In a case where a father lent the sum of 10,000*l.* to his son, to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the repayment of that sum on demand: It appeared, that it was in consequence of the urgent desire of the intestate that the son engaged in the business; and that finding it was a losing concern he became desirous of retiring from it, but that the father urged him to continue it; that at the earnest entreaty of the intestate, he, with much reluctance, continued the business, and sustained heavy losses in it: The father on his deathbed caused the promissory note to be burned, and died intestate: Sir John Leach, M. R., held, that, although the circumstances under which the note had been destroyed amounted to an equitable release of the debt, yet that the sum which remained due upon it must be considered an advancement to the son (*a*). Any sum of considerable amount paid out of the common fund of a family to or for the benefit of a child is an advancement within the meaning of the Statute of Distributions. Thus a premium upon the occasion of a son being articled to an attorney (*b*): a sum paid for the purchase of a commission in the army for a son (*c*): sums paid by a father to a son to enable him to pay his debts (*d*): the payment of the admission fee to one of the Inns

(*a*) *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254. In the case of *Smith* v. *Conder*, 9 C. D. 170, where a testator, who died in 1874, by his Will in 1864 gave the residue of his property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot, Hall, V.-C., held that a letter written by the testator to one of his sons in 1873, whereby he stated that if he would give the testator a promissory note for a sum mentioned less than the amount advanced to the son he would write off the balance, was inadmissible in evidence, inasmuch as it was not sought thereby to rebut a presumption, but to displace an express declaration contained in a testamentary instrument by declarations not testamentary. But it is submitted that the letter, together with the promissory note, was evidence of satisfaction of the advance. The note was not, as in *Gilbert* v. *Wetherell*, given with the advance.

(*b*) *Boyd* v. *Boyd*, L. R. 4 Eq. 305.

(*c*) *Ibid.*; *Taylor* v. *Taylor*, L. R. 20 Eq. 155.

(*d*) *Boyd* v. *Boyd*, L. R. 4 Eq. 305; *Auster* v. *Powell*, 31 Beav. 583; 1 De G. J. & S. 99; *Re Blockley*, 29 C. D. 250. This, however, was held by Jessel, M. R., not to be an advancement: *Taylor* v. *Taylor*, *ubi supra*. In *Re Scott*, [1903] 1 Ch. 1, the Court of Appeal preferred the view taken by Jessel, M. R., in *Taylor* v. *Taylor*—that a

of Court in the case of a son intended for the Bar (*e*): the price of the outfit of a son entering the army (*f*): the price of plant and machinery and other payments to start a child in business (*g*): have been held to be advancements.

what shall not constitute an advancement.

On the other hand, small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to a child, as of a gold watch, or wedding clothes, shall not be deemed an advancement (*h*): nor shall money expended by the father for the maintenance of a child, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (*i*).

It is presumed, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a premium for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought into hotchpot (*k*). In allusion to this distinction, it is conceived that Lord Hardwicke expressed himself in *Morris* v. *Burroughs* (*l*): "I should think," said his Lordship, "that if a father should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c., that would have the same effect," *i.e.*, will be a satisfaction of the custom, or must be brought into hotchpot, as the case may happen to be.

sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion, but may be regarded as a temporary assistance—to the view taken by Wood, V.-C., in *Boyd* v. *Boyd*, and by Pearson, J., in *Re Blockley*.

(*e*) *Taylor* v. *Taylor*, *ubi supra*.

(*f*) *Taylor* v. *Taylor*, *ubi supra*. But *quære*: *Boyd* v. *Boyd*, L. R. 4 Eq. 305.

(*g*) *Taylor* v. *Taylor*, *ubi supra*.

(*h*) 3 P. Wms. 317, note to *Pusey* v. *Desbouverie*; *Elliott* v. *Collier*, 1 Ves. Sen. 16; *S. C.*, 3 Atk. 528. Nor, says Swinburne, money in his purse to spend among his equals, or buy him suits of apparel, or books, or armour for the service of his country: Swinb. Pt. 3, s. 18, pl. 30.

(*i*) Swinb. Pt. 3, s. 18, pl. 19; Bac. Abr. tit. Exors. (K.). See also *Taylor* v. *Taylor*, L. R. 20 Eq., 155, where Sir G. Jessel, M. R., was of opinion that nothing was an advancement unless given on marriage or to establish the child in life, and accordingly he there held that (1) payment of a fee to a special pleader in the case of a son intended for the Bar; (2) price of outfit and passage money of an officer and his wife on going out to India with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his housekeeping and other expenses, were not advancements. See *ante*, p. 1246, note (*d*).

(*k*) 2 Rop. Husb. & Wife, 12.

(*l*) 1 Atk. 403.

A provision which a father may make for his child by Will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought into hotchpot (*m*). Such a provision as shall be construed an advancement must result from a complete act of the intestate in his lifetime (*n*), by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death (*o*). Still less shall property given or bequeathed to the child by any other person be so denominated (*p*): and least of all shall a fortune of his own acquisition, however great (*q*).

SECTION IV.

The Rights of the Next of Kin of the Intestate under the Statute of Distributions.

The 6th section of the statute provides, that in case there be no children or legal representatives of them, in existence, a moiety of the intestate's estates shall be allotted to his widow, and the residue shall be distributed equally among his next of kin in equal degree, and their representatives (*r*); and by the 7th section, in case there be neither wife nor children, then all the estate shall be distributed among the next of kin, in equal degree; but the same section enacts, that there shall be no representations admitted among collaterals after brothers' and sisters' children.

Who are the next of kin:

The next of kin referred to by the statute are to be ascertained by the same rules of consanguinity, as those which determine who are entitled to letters of administration (*s*). These rules have been already considered in a former part of this Treatise (*t*); but it may be convenient to repeat in this place some of their results.

Right of the father:

When a child dies intestate, without wife or child, leaving a father, the latter is entitled as the next of kin, in the first

(*m*) *Walton* v. *Walton*, 14 Ves. 324; and see *ante*, p. 1241.

(*n*) *Edwards* v. *Freeman*, 2 P. Wms. 440; Toller, 380.

(*o*) *Ante*, p. 1244; Toller, 380.

(*p*) Swinb. Pt. 3, s. 18, pl. 18; Bac. Abr. tit. Exors. (K.); Toller, 380.

(*q*) Swinb. Pt. 3, s. 18, pl. 18; Bac. Abr. tit. Exors. (K.).

(*r*) But see the Intestates' Estates Act, 1890, *ante*, p. 1232.

(*s*) *Lloyd* v. *Tench*, 2 Ves. Sen. 214; 2 Black. Com. 515; Toller, 381; 4 Burn, E. L. 280, 8th edit.

(*t*) *Ante*, p. 328 *et seq.*

degree, to the whole of the personal estate of the intestate, exclusive of all others (*u*).

If a man dies intestate, without a child, but leaving a widow, and a father, then the personal estate shall go in moieties between the widow and father, subject to the widow's primary right under the Intestates' Estates Act, 1890 (*x*).

right of the mother: 1 Jac. II. c. 17:

So with respect to the mother; before the statute of 1 Jac. II. c. 17, if a child died intestate, without a wife, child, or father, his mother was entitled, as his next of kin, in the first degree to his whole personal estate: But by that statute, sect. 7, it is enacted, "that if after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." The principle of this provision is, that otherwise the mother might marry, and transfer all to another husband (*y*).

the brothers and sisters shall share with the mother:

This statute as well as the Statute of Distributions, was described by Lord Hardwicke as very incorrectly penned (*z*); and several questions have arisen upon the construction of this section of it. In *Keilway* v. *Keilway* (*a*), the intestate left no child, but a wife, a mother, three brothers and sisters, and two nieces, the children of a deceased brother: It was insisted, on the part of the mother, that the case was not within the statute of 1 Jac. II. c. 17, s. 7, because here the intestate left a wife; whereas the statute was only meant to operate where the mother, before the making of it, would have gone off with the whole personal estate, and it was urged, on her behalf, that the words of the statute "without wife *or* children," must be understood "without wife *and* children;" for it could not possibly be intended in the disjunctive, *i.e.*, that in *either* case the brothers and sisters should share with their mother, inasmuch as if, after the death of the father, the child should die *without wife*, but leaving *children*, they would clearly take the whole, to the exclusion of the intestate's brothers and sisters: But Lord Chancellor King decreed that the wife of the intestate should

they shall share with the mother, although the widow:

(*u*) *Blackborough* v. *Davis*, 1 P. Wms. 51; *ante*, p. 332.

(*x*) *Keilway* v. *Keilway*, Gilb. Eq. Cas. 190, *per curiam*. See the effect of the Intestates' Estates Act, *ante*, p. 1232.

(*y*) *Blackborough* v. *Davis*, 1 P. Wms. 49, by Lord Holt.

(*z*) *Stanley* v. *Stanley*, 1 Atk. 457.

(*a*) 2 P. Wms. 344; *S. C.*, Gilb. Eq. Cas. 189; 2 Stra. 710; 2 Eq. Cas. Abr. 441, 442.

have one moiety, and his mother should come in for no more than her share of the other moiety with the intestate's brothers and sisters, and the two nieces, the representatives of the deceased brother: And his Lordship laid down, that the intention of the statute was, in prejudice of the mother, that in every case where, before the statute, she would have had the whole, the deceased child's brothers and sisters should come in equally with the mother as to the whole; and where, before the statute, the mother would have been entitled to the half, the deceased child's brothers and sisters should now come in for a share of that moiety.

though there be no brother of the intestate living, yet if there be nephews, &c., they shall share with their grandmother:

In *Stanley* v. *Stanley* (*b*), the intestate left a wife, a mother, and several nephews and nieces, the children of a deceased brother: Besides raising the objections taken in the above case of *Keilway* v. *Keilway*, it was insisted, on the part of the mother, that the words of the statute of James are in the conjunctive, "every brother and sister *and* the representatives of them," and therefore that the statute cannot operate in a case where there is *no brother or sister* of the intestate living: But Lord Hardwicke, C., held the contrary; and after recognizing *Keilway* v. *Keilway*, as far as it applied, decreed, that the personal estate should be divided into four equal parts, two-fourth parts to be allotted to the widow, one-fourth part to the mother, and the remaining fourth to be equally divided among the nephews and nieces: And his Lordship said, that the word *and* in the statute, immediately preceding the words *the representatives*, must be construed in the disjunctive.

the representatives of the brothers and sisters of the intestate shall not share with his mother, beyond the brothers' and sisters' children:

In the last case, a further objection was raised, that if it should be held that the nephews and nieces were entitled by representation, it might be carried to the fourth or fifth generation, which would create great confusion and fractions; for there was nothing to restrain it in this Act, as there was in the Statute of Distributions: But Lord Hardwicke said, that the proviso in the statute of James was to be incorporated into the statute of Charles, which expressly says that representation shall not be carried beyond brothers' and sisters' children; agreeably to the rule, that statutes made *in pari materiâ* shall be construed into one another.

brothers and sisters of the half-blood

In *Jessopp* v. *Watson* (*c*), a widow, having an only daughter by her deceased husband, married a second husband, and had

(*b*) 1 Atk. 455. (*c*) 1 M. & K. 665.

two sons by the latter marriage: Afterwards her daughter by the former marriage died intestate, without ever having married: And the question was, whether her mother was entitled exclusively to her daughter's personal estate, or whether the brothers of the half-blood, her children by the second marriage, were entitled to share with her: And Sir John Leach, M. R., held, that by force of the statute of James, the brothers were entitled to a share with their mother (*d*).

shall share with their mother.

If the intestate left neither wife, nor child, nor father, and there be neither brother or sister, nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother (*e*).

In what case the mother shall take the whole.

It is clear that the mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions (*f*).

Of the mother-in-law.

If the intestate left neither children nor parents, but his nearest surviving relations be brothers and sisters, and a grandfather or grandmother, then, since they are all in the second degree of kindred, in strictness they ought all to share the personal estate of the intestate equally under the statute. But in the year 1686, in the case of *Lord Winchelsea* v. *Norcliffe* (*g*), Lord Chancellor Jeffreys decided that a grandmother should have no share with brothers and sisters of the intestate. And it was again decided, in 1708, by the Barons of the Exchequer in the case of *Poole* v. *Wishaw* (*h*), by the unanimous opinion of the Court, after hearing civilians, that a grandmother had no right to share in distribution with a brother. This decision was followed by a similar one, as to a grandmother, in the case of

Right of brothers and sisters: preferred to grandfather, &c.

(*d*) The same point appears to have been determined by Lord Hardwicke in *Burnet* v. *Mann*, 1 Ves. Sen. 156, *ante*, p. 1238, n. (*c*); though it is inaccurately stated by Vesey, that the claim of the posthumous brother of the half-blood was there made, *under the Statute of Distributions:* but in *Jessopp* v. *Watson*, Mr. Seaton, who was of counsel in the cause, stated that he had examined the case of *Burnet* v. *Mann*, in the Registrar's Book, from which it appeared that the claim was made under the statute 1 Jac. II. c. 17, s. 7; and that the decision in that case was, consequently, an express decision in point. See also *Wallis* v. *Hodson*, Barnard. Chan. Cas. 272.

(*e*) *Jackson* v. *Prudehome*, MS. 11 Viner, Abr. 196, tit. Exors. (Z. 12).

(*f*) *Rutland* v. *Rutland*, 2 P. Wms. 216.

(*g*) 2 Freem. 95.

(*h*) Cited *per curiam* in *Evelyn* v. *Evelyn*, 3 Atk. 763; and in *Thomas* v. *Ketteriche*, 1 Ves. Sen. 333.

Norbury v. *Richards*, before Fortescue, M. R. (*i*). And the same point was afterwards determined by Lord Hardwicke, in *Evelyn* v. *Evelyn* (*k*), on the authority of the two preceding cases, as well as the prevailing usage since the Statute of Distributions: And his Lordship observed, that if it was *res integra*, he should think there was just ground to prefer the brother: That the words of the statute must be taken together, amongst the next of kin, "*pro suo cuique jure*," according to the laws in such cases; and that if, by settled determinations, an equality or preference had been given, it was confirmed by the statute: And by our law it had been established, previously to the statute, that between brother and brother there was only one degree (*l*): That, besides, it would be a great inconvenience to carry the portions of children to a grandfather, who must be supposed to have been provided for, and may very probably be in a dying condition, and not want it; and it would be contrary to the very nature of provisions among children, as every child may very properly be said to have a *spes accrescendi*.

Grandfather preferred to uncle:

Nevertheless, if the intestate leaves no nearer kindred than a grandfather or grandmother, and uncles or aunts, the grandfather or grandmother, being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles, or aunts, who are only in the third degree (*m*).

great grandfather shall share with uncle:

Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts (*n*).

grandfather by mother's side.

Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties, as being in equal degree; for here dignity of blood is not material (*o*).

(*i*) Cited in 3 Atk. 763.

(*k*) 3 Atk. 762.

(*l*) See *Collingwood* v. *Pace*, 1 Ventr. 424, by Hale, C. B.; *Blackborough* v. *Davis*, 1 P. Wms. 50; *Buissieres* v. *Albert*, 2 Cas. temp. Lee, 53, by Sir George Lee. It is enough in law to say, *frater et hæres* or *soror et hæres*: 1 Salk. 38. See stat. 3 & 4 Will. IV. c. 106, s. 5, by which it is enacted that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or a sister shall be traced through the parent.

(*m*) *Mentney* v. *Petty*, Prec. Chanc. 593; *Blackborough* v. *Davis*, 1 P. Wms. 41; *Woodroff* v. *Winkworth*, Prec. Chanc. 527.

(*n*) *Lloyd* v. *Tench*, 2 Ves. Sen. 215; *ante*, p. 332.

(*o*) *Moor* v. *Barham*, cited in *Blackborough* v. *Davis*, 1 P. Wms. 53.

Uncles and nephew.

Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled (*p*). Hence, where the intestate left two aunts, and a nephew and niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by representation; but that if their father had been living he would have been entitled to the whole (*q*).

Relatives by marriage not entitled.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute: Therefore, if the intestate had a son and daughter, and they both die, the former leaving a wife, and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate (*r*).

Representation among collaterals.

The 7th section of the Statute of Distributions provides that there shall be no representations admitted among collaterals after brothers' and sisters' children. This provision must be construed to mean brothers and sisters *of the intestate*, and not as admitting representation, when the distribution happens to fall among brothers and sisters, who are remotely related to the intestate: for the intestate is the subject of the Act; it is his estate, his wife, his children, and for the same reason his brothers' and sisters' children; for he is equally correlative to all (*s*). Therefore, if the intestate should leave an uncle, and the son of another uncle deceased, the latter shall have no distributive share (*t*). So if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution. Again, it has been held, that if the brother of the intestate left a grandson, and a sister left a child, the grandson shall not have distribution with the son or daughter of the sister (*u*). Thus, although, as it has already appeared, lineal representatives *ad infinitum* shall share in the distribution of an intestate's

(*p*) *Buissieres* v. *Albert*, 2 Cas. temp. Lee, 51.

(*q*) *Durant* v. *Prestwood*, 1 Atk. 454; *Lloyd* v. *Tench*, 2 Ves. Sen. 213; *Buissieres* v. *Albert*, 2 Cas. temp. Lee, 51.

(*r*) Toller, 386.

(*s*) *Carter* v. *Crawley*, Sir T. Raym. 496; *Caldicot* v. *Smith*, 2 Show. 286.

(*t*) *Beeton* v. *Darkin*, 2 Vern. 168; *Bowers* v. *Littlewood*, 1 P. Wms. 195.

(*u*) *Pett* v. *Pett*, 1 Salk. 250.

personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it (*x*).

When brothers' and sisters' children take *per capita*.

If the intestate's brothers and sisters were, at the time of his decease, all dead, and having left children, such children shall all take *per capita* (*y*). Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother (*z*). But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left children, such children take *per stirpes*, by way of representation (*a*). Therefore, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other (*b*).

(*x*) Toller, 384.

(*y*) *Walsh* v. *Walsh*, Prec. Chanc. 54.

(*z*) *Bowers* v. *Littlewood*, 1 P. Wms. 595; *Janson* v. *Bury*, Bunb. 157.

(*a*) *Lloyd* v. *Tench*, 2 Ves. Sen. 215; *Buissieres* v. *Albert*, 2 Cas. temp. Lee, 51.

(*b*) So, in the case of a *bequest*, it has been held that if a testator directs his executors to pay and divide the residue of his personal estate "unto and amongst my own next of kin under the Statute of Distributions," brothers and deceased brothers' children take *per stirpes: Lewis* v. *Morris*, 19 Beav. 34. See also *Mattison* v. *Tanfield*, 3 Beav. 131; *Martin* v. *Glover*, 1 Coll. 269. So where there was a gift "to and amongst the next legal representatives of A. and B., share and share alike;" their next of kin, according to the statute, were held entitled *per stirpes: Booth* v. *Vicars*, 1 Coll. 6, *ante*, p. 898 (but see *Richardson* v. *Richardson*, 14 Sim. 526); *Smith* v. *Palmer*, 7 Hare, 225. And it has been thought that the same distinction, as to taking *per capita* or *per stirpes*, will prevail, when a bequest is made to "relations," or "family," without mentioning the proportions in which the fund is to be divided; in which case it has been said, the Statute of Distributions will regulate the manner as well as the number in which the legatees, *i.e.*, the next of kin, are to take. But this has been denied (see *ante*, p. 878, note (*t*)). And at all events, such a mode of division will not be adopted, when a contrary intention of the testator is apparent, as where the bequest is to relations *to be equally divided* amongst them; for there the division shall be *per capita*, although the state of the family is such as would require a distribution *per stirpes* under the statute: *Thomas* v. *Hole*, Cas. temp. Talb. 251; *Heron* v. *Stokes*, 2 Dr. & W. 89. So if there be a bequest of a fund *to be equally divided* amongst the testator's next of kin, both ma-

If a bastard, or any other person having no kindred, die intestate without wife or child, his effects, subject to his debts,

An intestate bastard: or person without kin.

ternal and paternal, it is divisible between the two classes *per capita* and not *per stirpes: Dugdale* v. *Dugdale*, 11 Beav. 402. Again, if there is a bequest to "A. and to the children of B., *to be equally divided*," they take *per capita: Dowling* v. *Smith*, 3 Beav. 541. See also *Butler* v. *Stratton*, 3 Bro. C. C. 367; *Lenden* v. *Blackmore*, 10 Sim. 626; *Rickabe* v. *Garwood*, 8 Beav. 579; *Baker* v. *Baker*, 6 Hare, 269; *Pattison* v. *Pattison*, 19 Beav. 638; *Tyndale* v. *Wilkinson*, 23 Beav. 74; *Armitage* v. *Williams*, 27 Beav. 346; *Re Davies' Will*, 29 Beav. 93; *Rook* v. *Att.-Gen.* 31 Beav. 313; *Robinson* v. *Shepherd*, 32 Beav. 665; *Gibson* v. *Fisher*, L. R. 5 Eq. 51; *Payne* v. *Webb*, L. R. 19 Eq. 26. But these and similar words may be controlled by the context: *Brett* v. *Horton*, 4 Beav. 239; *Re Campbell's Trusts*, 31 C. D. 685; 33 C. D. 98; and cf. *Re Stone*, [1895] 2 Ch. 196. So where a fund is directed to be paid on a particular event, in such cases as the following, namely—where a fund is to be divided "between the families of my brother L. and my sister E."—where one-fourth of a residue is to be paid to the younger children of N., and one other fourth paid to or amongst the younger children of S.—where a legacy is to be paid between and amongst the children of P. and the children of R.—in these and similar instances, it has been held that the distribution is to be *per capita*, and not *per stirpes: Abrey* v. *Newman*, 16 Beav. 433, by Romilly, M. R., citing *Barnes* v. *Patch*, 8 Ves. 604; *Lincoln* v. *Pelham*, 10 Ves. 166; *Rickabe* v. *Garwood*, *ubi supra*; *Malcolm* v. *Martin*, 3 Bro. C. C. 50; *Pearce* v. *Edmeades*, 3 Y. & Coll. 246. Again, if a bequest is made to "issue" as purchasers, or to "descendants," all those who answer the description will take *per capita: Davenport* v. *Hanbury*, 3 Ves. 257; *Leigh* v. *Norbury*, 13 Ves. 340; *Head* v. *Randall*, 2 Y. & Coll. C. C. 231; *Evans* v. *Jones*, 2 Coll. 216; *ante*, p. 875. But in this case also, they will take *per stirpes*, if the testator's intention to that effect appears from other expressions in the Will: *Rowland* v. *Gorsuch*, 2 Cox, 187. A distinction has been taken between a gift to several, with remainder to their children, and a gift to several, with a substitutionary gift to their children: Where there was a bequest of a fund to be equally divided between A. and wife and B. and wife for their lives, after which, to be equally divided between the children of A. and B., it was held, that the children all took *per capita: Abrey* v. *Newman*, 16 Beav. 431. See also *Swabey* v. *Goldie*, 1 C. D. 380. But where there was a bequest to A. for life, after which "equally amongst her sisters or their children living at her decease," it was held, that such of the children as were entitled took *per stirpes: Congreve* v. *Palmer*, 16 Beav. 435. See also *Flinn* v. *Jenkins*, 1 Coll. 365; *Arrow* v. *Mellish*, 1 De G. & Sm. 355; *Shand* v. *Kidd*, 19 Beav. 310; *Begley* v. *Cook*, 3 Drew. 662. See also *Re Hutchinson's Trusts*, 21 C. D. 811, where the gift was in trust for "A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S., share and share alike, and after the

belong to the king, as *ultimus hæres* (*c*); not in a fiduciary character, but beneficially (*d*); who, with the exception of a small part, usually grants them by letters patent or otherwise: and then such grantee seems entitled as of course to the administration, and consequently to the sole enjoyment of the property (*e*).

SECTION V.

Of Distribution when the Intestate was domiciled abroad.

Hitherto it has been assumed that the intestate was, at the time of his death, domiciled in a place where the Statute of Distributions is the law of the land.

Distribution shall be according to the country of domicil:

The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time (*f*). It is

decease of the said F. H. S. and R. S. to their children, share and share alike, and to their heirs for ever," in which case the fund was held divisible *per stirpes*, *i.e.*, in moieties between the representatives of F. H. S. and the children of R. S. Even where the division is by the terms of the Will to be *per stirpes*, a question may arise how far back you are to go to discover the stocks which are intended by the testator. *Gibson* v. *Fisher*, L. R. 5 Eq. 51, seems to have decided that where a gift was *per stirpes*, the *stirpes* must be found at the earliest possible point. In so holding, Romilly, M. R., refused to follow the decision in *Robinson* v. *Shepherd*, 4 De G. J. & S. 129. But in *Re Wilson*, 24 C. D. 664, it was held, following *Robinson* v. *Shepherd*, that where a gift is to the descendants or issue "of A. and B. *per stirpes*, it seems that you must look to the number of families or *stirpes* descended from A. or B. and existing at the testator's death, and divide the fund primarily into a corresponding number of parts."

(*c*) *Megit* v. *Johnson*, Dougl. 548, by Lord Mansfield; *Taylor* v. *Haygarth*, 14 Sim. 8; *Re Bond*, [1901] 1 Ch. 15. But if he leave a widow and no children, the Crown only gets one moiety; the other belongs to the widow: *Cave* v. *Roberts*, 8 Sim. 214. See *ante*, p. 342; and as to the effect of the Intestates' Estates Act, 1890, see *ante*, p. 1232.

(*d*) *Kane* v. *Reynolds*, 4 De G. M. & G. 571, by Lord Cranworth; *Att.-Gen.* v. *Kohler*, 9 H. L. C. 654. See *ante*, p. 342.

(*e*) *Ante*, pp. 342, 343; Toller, 386; 2 Black. Com. 505, 506.

(*f*) *Enohin* v. *Wylie*, 10 H. L. C. 1, 13; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Re Trufort*, 36 C. D. 600. However, "the law of the country" must not always be understood to mean the general law as applicable to the subjects thereof, but in some instances the

not, however, correct to say, that with respect to the distribution of personal property, the law of England gives way to the law of a foreign country; but that it is part of the law of England, that personal property should be distributed according to the *jus domicilii* (*g*). If, therefore, a man die domiciled in this country, and administration be taken out to him here, debts due to him, or other of his personal effects, in Scotland or abroad, shall be distributed according to the law of England: for the *lex loci rei sitæ* is not to be recognized (*h*). On the other hand, if a man domiciled abroad die intestate, his whole personal property here is distributed according to the laws of the country where he was so domiciled (*i*). If it were otherwise, as it was observed by

particular law applicable to the case of foreigners dying domiciled therein: *Collier* v. *Rivaz*, 2 Curt. 855, *ante*, p. 276; *Maltass* v. *Maltass*, 1 Robert. 67, 72, *ante*, p. 277. As to the conclusiveness of the judgments of the Courts of domicil in the Courts of a foreign country, see *ante*, pp. 278, 279; and *Pemberton* v. *Hughes*, [1899] 1 Ch. 781. As to the sense in which the English law adopts the law of the domicil, see *Lynch* v. *Government of Paraguay*, L. R. 2 P. & D. 268. The rule is, that the law *adopts the law of the domicil as it stands at the time of the death*, and it does not undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law: *ibid.* Where a British subject whose domicil of origin is Colonial acquires, according to English law, a domicil of choice in a country whose laws do not recognize domicil, but distribute the movables of a foreigner dying within their jurisdiction according to the law of his nationality, and dies there, the English Court will distribute his movables according to the law of his domicil of origin: *Re Johnson*, *Roberts* v. *Att.-Gen.*, [1903] 1 Ch. 821.

(*g*) By Abbott, C. J., in *Doe* v. *Vardill*, 5 B. & C. 451, 452. The rule as to the law of domicil has never been extended to real property: *Doe* v. *Vardill*, 5 B. & C. 451; *S. C.*, in Dom. Proc. 2 Cl. & F. 571; *S. C.*, *nomine Birtwhistle* v. *Vardill*, 7 Cl. & F. 895. But the rule laid down in the above case, viz., that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit real property in England, relates only to the case of descent upon an intestacy, and does not affect the case of a devise of real estate to "children": *Re Grey's Trusts*, [1892] 3 Ch. 88. As we have already seen (*ante*, p. 1237, note (*t*)), a child legitimate by the law of its father's domicil, but illegitimate according to English law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England, under the Statute of Distributions: *Re Goodman's Trusts*, 17 C. D. 266 (reversing the decision of Jessel, M. R., 14 C. D. 619).

(*h*) *Thorne* v. *Watkins*, 2 Ves. Sen. 35; *Re Ewin*, 1 Crompt. & Jerv. 156, by Bayley, B.

(*i*) But it must be remembered, that as the validity of a testa-

Lord Hardwicke, in *Thorne* v. *Watkins* (*k*), it would destroy the credit of the public funds; for no foreigner would put into them, if, because a title must be made up by administration or probate of the Probate Court of England, the property was to be distributed differently from the laws of his own country.

Hence it appears that a different doctrine prevails with respect to the distribution of the personal estate of a deceased, when in the hands of an executor or administrator, from that which is established with respect to the grant of probate or administration, by which he is empowered to possess himself of such estate: for, with regard to the latter, the *situs* of the property, as it has appeared in an earlier part of this Treatise, regulates the jurisdiction (*l*).

Although right to succession regulated by law of domicil of deceased, yet the administration of the estate must be in the country where possession of it is taken.

It must, however, be borne in mind, that (as there has already been occasion to point out (*m*)), although the right to succession is to be regulated according to the law of the country where the deceased was domiciled, yet the *administration of the estate* must be in the country in which possession of it is taken and held under lawful authority. In performing this duty the Court in which the estate is administered will be guided by the law of the domicil, and must ascertain for itself what the rights of the

mentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicil (*Freke* v. *Lord Carbery*, L. R. 16 Eq. 461), so leaseholds in England belonging to a domiciled Scotchman were held to devolve, in the case of intestacy, upon the person entitled according to the English Statute of Distributions: *Duncan* v. *Lawson*, 41 C. D. 394. See also *In the goods of Gentili*, Ir. Rep. 9 Eq. 541, in the judgment in which Warren, J., refers to *Freke* v. *Lord Carbery* as a distinct authority that the succession to chattels real depends upon the *lex loci*. See also *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123; and *Pepin* v. *Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24. See further *Leslie* v. *Baillie*, 2 Y. & Coll. Ch. C. 91, in which case a testator who died, and whose Will was proved, in England, bequeathed a legacy to a married woman, whose domicil, as well as that of her husband, was in Scotland: The husband died a few months after the testator, without having received the legacy: After his death the executors of the testator, with knowledge of the beforementioned circumstances of the domicil, paid the legacy to the widow: It was proved that, according to the Scotch law, the payment should have been made to the husband's personal representatives: Nevertheless, it was held by Knight Bruce, V.-C., that in the absence of proof that the executors knew the Scotch law on the subject, the payment to the widow was a good payment.

(*k*) 2 Ves. Sen. 37.

(*l*) See *per* Wood, V.-C., in *Campbell* v. *Beaufoy*, Johns. 326.

(*m*) *Ante*, p. 340.

parties are under that law (*n*). Lord Westbury, in *Enohin* v. *Wylie* (*o*), says: "I hold it to be now put beyond all possibility of question that the administration of the personal estates of the deceased belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicil. In short, the Court of the domicil is the *forum concursûs* to which the legatees under the Will of a testator or the parties entitled to the distribution of the estate of an intestate are required to resort." But, as Stirling, J., pointed out in his judgment in *Re Trufort* (*p*), this statement of the law by Lord Westbury has not, in its entirety, met with complete acceptance, and in particular, it has been more than once criticized by Lord Selborne, whose views are perhaps most fully stated in the case of *Ewing* v. *Orr-Ewing* (*q*), where he says: "So far as relates to domicil it has always appeared to me to be clear that the domicil of a deceased testator or intestate cannot in principle furnish any governing or necessary rule except for the purpose of determining the succession to movable estate. For that purpose recourse must be had not always or necessarily to the Courts, but always, and necessarily, to the law of the domicil. The succession being once ascertained, the rights resulting therefrom belong to, and follow, the person of the living successor, and not the dead predecessor. It has never been held that the forum in which such rights may be vindicated depends upon the domicil either of the plaintiff or

(*n*) *Preston* v. *Lord Melville*, 8 Cl. & F. 1, *ante*, p. 340. See *per* Lord Cranworth in *Enohin* v. *Wylie*, 10 H. L. C. 19; *Ewing* v. *Orr-Ewing*, 9 App. Cas. 34; 10 App. Cas. 453. See also *The Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 456, *per* Lord St. Leonards. But it has been held (following the dicta of Lord Westbury in *Enohin* v. *Wylie*, *ubi supra*) that the legal personal representative constituted by the forum of domicil of a deceased person is entitled to receive the personal estate of the deceased got in through any letters of administration, wherever they may be, and the next of kin cannot make any claim against the estate except through the intervention of such legal personal representative: *Eames* v. *Hacon*, 16 C. D. 407; 18 C. D. 347. Where the Probate Division of the High Court of Justice had granted a general probate of a Will of a Scotch testator, the Chancery Division made the ordinary decree for the administration of the personal estate of the testator without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors: *Stirling-Maxwell* v. *Cartwright*, 9 C. D. 173; 11 C. D. 522.

(*o*) 10 H. L. C. 1.

(*p*) 36 C. D. 600.

(*q*) 10 A. C. 453, 502.

defendant in any action or suit, and if the domicil of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected or those liabilities enforced can necessarily depend on the domicil of the deceased. . . . The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of domicil." Lord Cranworth, in *Doglioni* v. *Crispin* (*r*), says: "No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domiciled at his death. The Courts of that country must decide who is entitled, and from their decision there can be no appeal. It does not always happen, as is the case here, that the claim of the party litigating in our Courts has been actually raised and decided in the Courts of the country of the domicil. It is therefore often matter of necessity that our Courts should receive evidence from learned foreigners as to what the law of domicil is. Such evidence is, in general, far from satisfactory, but it often happens that no better evidence can be obtained, and then the Courts here must ascertain, from the conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the Courts of his domicil after long and careful consideration, and by their decision we are bound." Stirling, J., in his judgment in *Re Trufort*, after citing the above quoted passages from the judgments of Lord Westbury, Lord Selborne and Lord Cranworth, says, that the rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who, according to the law of the domicil, are entitled to the estate, yet where the title has been adjudicated upon by the Courts of the domicil such adjudication is binding upon and must be followed by the Courts of this country (*s*); even if the judgment of the foreign Court has

(*r*) L. R. 1 H. L. 301, 314.

(*s*) *Enohin* v. *Wylie*, 10 H. L. C. 1; *Ewing* v. *Orr-Ewing*, 10 App. Cas. 453; *Doglioni* v. *Crispin*, L. R.

by default of the party complaining of the judgment proceeded on a mistake as to the English law (*t*); or the whole of the facts were not before the foreign tribunal (*u*); for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong recourse must be had to the mode of appeal provided in the foreign country (*x*).

rules for ascertaining the domicil.

It remains to ascertain, what shall constitute a domicil with respect to the proper application of the above rule (*y*).

A man's domicil is, *primâ facie*, the place of his residence: but this may be rebutted by showing that such residence is either constrained from the necessity of his affairs or transitory (*z*). On this subject, the following propositions may be stated as deducible from the adjudged cases:

1. Though a man may have two domicils for some purposes, he can have only one for the purpose of succession (*a*).

1 H. L. 301; *Re Trufort*, 36 C. D. 600; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

(*t*) *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Godard* v. *Gray*, L. R. 6 Q. B. 139.

(*u*) *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301.

(*x*) *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

(*y*) On this subject generally, see the erudite and valuable Treatise on the Law of Domicil, by Dr. Robert Phillimore.

(*z*) *Bempde* v. *Johnstone*, 3 Ves. 201, 202, by Lord Loughborough. With respect to the effect of *time* in constituting a domicil, see the judgment of Sir Wm. Scott in *The Case of the Harmony*, 2 Rob. Adm. Rep. 324, and *The Case of the Ann*, 1 Dods. Adm. Rep. 221. See further, as to what shall constitute a domicil, *Stanley* v. *Bernes*, 3 Hagg. 373; *Moore* v. *Darell*, 4 Hagg. 346; *Re Bruce*, 2 Cr. & Jerv. 436; *Tidswell* v. *Bowyer*, 7 Sim. 64; *Maltass* v. *Maltass*, 1 Robert. 67; *Whicker* v. *Hume*, 13 Beav. 366; 7 H. L. C. 124; *Heath* v. *Samson*, 14 Beav. 441; *Anderson* v. *Laneuville*, 9 Moo. P. C. 325; *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *S. C.*, Dea. & Sw. 192; *Att.-Gen.* v. *Kent*, 1 Hurl. & C. 12; *Att.-Gen.* v. *Rowe*, *ibid.* 31; *President of the United States* v. *Drummond*, 33 Beav. 449; *Att.-Gen.* v. *Fitzgerald*, 3 Drew. 610; *Douglas* v. *Douglas*, L. R. 12 Eq. 617; *Re Patience*, 29 C. D. 976. See also the definition of domicil stated by Lord Wensleydale, in *Whicker* v. *Hume*, 7 H. L. C. 164, viz., "Habitation [by a man] in a place with the intention of remaining there for ever, unless some circumstances should occur to alter his intention." It is always material in determining what is a man's domicil, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up: *Platt* v. *Att.-Gen. of New South Wales*, 3 A. C. 336.

(*a*) *Somerville* v. *Somerville*, 5 Ves. 750, 786; *Forbes* v. *Forbes*, Kay, 341; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441. With respect to contemporary domicils, the following distinction is recognised by

2. The original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil (*b*).

By the expression *forum originis*, or domicil of origin, here used, is not meant the domicil of birth: for the mere accident of birth in any particular place cannot in any degree affect the domicil: If the son of an Englishman is born upon a journey in foreign parts, his domicil would follow that of his father. The domicil of origin is that arising from a man's birth and connexions (*c*).

It appears from the terms of the proposition under consideration, that such a domicil cannot be lost by mere abandonment.

foreign jurists, and seems to have met with the concurrence of Lord Alvanley, in the above case of *Somerville* v. *Somerville*, 5 Ves. 750, 789, viz., that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country: on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicil there, and not at his country residence. See also *Forbes* v. *Forbes*, Kay, 341; *Aitchison* v. *Dixon*, L. R. 10 Eq. 589, 595. See also *S. C.* as to a domicil being gained by the permanent residence of a man's wife.

(*b*) *Somerville* v. *Somerville*, 5 Ves. 750, 787; *Re Bruce*, 2 Cr. & Jerv. 436, 445, *per* Bayley, B.; *De Bonneval* v. *De Bonneval*, 1 Curt. 856; *Att.-Gen* v. *Dunn*, 6 Mees. & W. 511; *Dalhousie* v. *M'Doual*, 7 Cl. & F. 817; *Munro* v. *Munro*, *ibid.* 842; *Brown* v. *Smith*, 15 Beav. 444. A change of domicil must be a residence *sine animo revertendi;* a temporary residence for purposes of health, travel, or business, does not change the domicil. Also every presumption is to be made in favour of the original domicil. No change can occur without an actual residence in a new place. No new domicil can be obtained without a clear intention of abandoning the old: *Lauderdale Peerage Case*, 10 A. C. 692. Again, in *Bell* v. *Kennedy*, L. R. 1 Sc. App. 307, 310, Lord Cairns says, "the law is clear beyond all doubt with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired." *Per* Lord Chelmsford, "it is for the parties who rely on a change of domicil to prove that such change took place": *ibid.* 319.

(*c*) *Somerville* v. *Somerville*, 5 Ves. 787; *Forbes* v. *Forbes*, Kay, 341.

It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired (*d*);

(*d*) *De Bonneval* v. *De Bonneval*, 1 Curt. 857; *Att.-Gen.* v. *Dunn*, 6 M. & W. 511; *Bell* v. *Kennedy*, L. R. 1 Sc. App. 307. The acquisition of a domicil does not simply depend upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former: *De Bonneval* v. *De Bonneval*, Curt. 863, 864; *Stevenson* v. *Masson*, L. R. 17 Eq. 78; *King* v. *Foxwell*, 3 C. D. 518; *Re Patience*, 29 C. D. 976. Accordingly, in *Aikman* v. *Aikman*, 3 Macq. 877, Lord Wensleydale laid down that "every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence, *with the intention of abandoning his domicil of origin*." This is contrary to the doctrine advanced in Story's Conflict of Laws, c. 3, s. 46, where it is said that "if a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return (to his native country) at some future period." But Lord Wensleydale's statement of the law has been adopted by the highest authorities, and it appears to be now settled that in order to acquire a new domicil a man must intend "*quatenus in illo exuere patriam*": *Moorhouse* v. *Lord*, 10 H. L. C. 272; *S. C., nom. Lord* v. *Colvin*, 4 Drew. 366. The expression "*exuere patriam*" is unfortunate, since the question of domicil is a question of residence and not of citizenship. *Haldane* v. *Eckford*, L. R. 8 Eq. 631, *per* James, V.-C. The presumption of law is against the intention to abandon the domicil of origin, and that although the length of residence in a foreign country *per se* according to time and circumstances raises a presumption of intention to abandon the domicil of origin and to acquire a new domicil, still such presumption may be rebutted by facts showing that there was no such intention. A change of domicil is not to be *inferred* from the fact of a lengthened residence in a foreign country. To constitute a change of domicil it must be *animo et facto*: *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285; *Re Capdevielle*, 2 H. & C. 985; *Att.-Gen.* v. *Blucher de Wahlstatt*, 3 H. & C. 374; *Jopp* v. *Wood*, 34 Beav. 88; affirmed by the Lords Justices, 34 L. J. (N. S.) Ch. 21; *Whicker* v. *Hume*, 7 H. L. C. 159, by Lord Cranworth. See also *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; *King* v. *Foxwell*, 3 C. D. 518; *Re De Almeda*, W. N. (1901) 142; W. N. (1902) 55. If the *animus* and *factum* are both satisfactorily proved, the permanent residence abroad will operate as a change of domicil, notwithstanding such residence was occasioned by mere preference of climate, or by the opinion that the habits of the country may be better suited to the health than those of the country which has been quitted: *Hoskins* v. *Matthews*, 8 De G. M. & G. 13; *Brunel* v. *Brunel*, L. R. 12 Eq. 298; *Haldane* v. *Eckford*, L. R. 8 Eq. 631; *Stevenson* v. *Masson*, L. R. 17 Eq. 78; *Urquhart* v. *Butterfield*, 37 C. D. 357. It should be observed

and apparently if a man be *in itinere* towards an intended domicil when death supervenes, it is a sufficient act for this purpose (*e*). In the recent case of *Winans* v. *Att.-Gen.* (*f*), it was laid down by the House of Lords that the onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost and that the domicil of origin continues unless a fixed and settled intention of abandoning the first domicil and acquiring another as the sole domicil is clearly shown.

3. The proposition last stated is equally true of an acquired as of an original domicil. The domicil of origin having been abandoned and a new domicil acquired, the new domicil may be abandoned and a third domicil acquired (*g*): But an acquired domicil cannot be lost by mere abandonment, but continues until the intention of another change of domicil is carried into execution (*h*). Again, the domicil of origin does not revive

that a man cannot retain his original domicil by a mere declaration of his intention to do so, if he so acts as to change it: *Re Steer*, 3 H. & N. 594; *Doucet* v. *Geoghegan*, 9 C. D. 441; *Att.-Gen.* v. *Winans*, [1904] A. C. 287. The intention required to effect a change of domicil (as distinguished from the acts embodying it) is an intention to settle in a new country as a permanent home, and this is sufficient without any intention to change the civil status, and, *semble*, even if an intention not to change the civil status be proved: *Douglas* v. *Douglas*, L. R. 12 Eq. 617. As to the value of conversations and declarations as evidence of a change of domicil, see *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441, 450; *Att.-Gen.* v. *Winans*, *ubi supra*. Change of domicil by evidence of intention, as affecting the status of husband and wife, was discussed in *Re Martin*, [1900] P. 211.

(*e*) *Munroe* v. *Douglas*, 5 Madd. 405; *Forbes* v. *Forbes*, Kay, 341; *In the goods of Bianchi*, 3 Sw. & Tr. 16; cf. *In the goods of Raffenel*, *ibid.* 49. But see Story's Conflict of Laws, Ch. xii. s. 481 a., p. 678, note (2), 8th edit.

(*f*) [1904] A. C. 287.

(*g*) *De Bonneval* v. *De Bonneval*, 1 Curt. 864.

(*h*) *Munroe* v. *Douglas*, 5 Madd. 379; *Stanley* v. *Bernes*, 3 Hagg. 373; *Craigie* v. *Lewin*, 3 Curt. 435; *Commissioners of Charitable Donations* v. *Devereux*, 13 Sim. 14; *Udny* v. *Udny*, L. R. 1 Sc. App. 441; *Bradford* v. *Young*, 29 C. D. 617; *Re Marrett*, 36 C. D. 400: *Att.-Gen.* v. *Winans*, *ubi supra*. In *Udny* v. *Udny* many important doctrines were laid down by several members of the House, which it is deemed desirable should be introduced into this Work, and they will, therefore, be found below.

By Lord Westbury:—Every individual has, at his birth, become the subject of some particular country by the tie of national allegiance, which fixes his *political status*, and becomes subject to the Law of the Domicil which deter-

until an acquired domicil has been abandoned *animo et facto* (*i*).

mines his civil status. To suppose that for a change of domicil there must be a change of national allegiance is to confound the political with the civil status, and to destroy the distinction between *patriam* and *domicilium*. [See also *Brunel* v. *Brunel*, L. R. 12 Eq. 298.]

By the Lord Chancellor (Lord Hatherley):—A man may change his domicil as often as he pleases but not his allegiance. *Exuere patriam* is beyond his power. [Dictum of Lord Kingsdown in *Moorhouse* v. *Lord*, qualified.]

Per Lord Westbury:—It is a settled principle that no man shall be without a domicil, and to secure this end the law attributes to every individual as soon as he is born, the domicil of the father, if the child is legitimate, or the domicil of the mother, if the child be illegitimate. This is called the domicil of origin, and is involuntary. It is the creation of law, not of the the party. It may be extinguished by an act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal. But it cannot be destroyed by the will and act of the party.

Domicils of choice and origin distinguished.

Domicil of choice is the creation of the party. When a domicil is acquired, the domicil of origin is in abeyance; but it is not absolutely extinguished or obliterated. When a domicil of choice is abandoned, the domicil of origin revives—a special intention to revert to it being unnecessary. [*King* v. *Foxwell*, 3 C. D. 518.]

Per Lord Chelmsford:—Story says, that the moment a foreign domicil is abandoned, the native domicil is re-acquired. The word "re-acquired" is an inaccurate expression. The meaning is, that the abandonment of an acquired domicil *ipso facto* restores the domicil of origin. If, after having acquired a domicil of origin, a man abandons it and travels in search of another domicil of choice, the domicil of origin comes instantly into action and continues until a second domicil of choice has been acquired.

Per Lord Westbury:—A natural-born Englishman may domicile himself in Holland, but if he breaks up his establishment there and quits Holland, declaring that he never will return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere.

Legitimation per subsequens matrimonium.

By the Lord Chancellor (Lord Hatherley):—The status of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the status of the putative father, not on that of the mother. According to English law, where at the time of the bastard's birth the father has his domicil in England, no subsequent change of domicil can render practicable the bastard's legitimation. [*Re Grove*, 40 C. D. 216; and see *ante*, p. 859, note (*z*).]

It may here further be observed, on the subject of Domicil, that if a man, at the time he attains his

(*i*) See next page.

As an example of what shall constitute an acquired domicil, it may be mentioned that a residence in India, for the purpose of following a profession there in the service of the East India Company, creates a new domicil (*k*).

majority, is of unsound mind, or remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicil for his son, and a change of domicil by the father will usually produce a similar change of domicil as regards the lunatic son. It has been also held, that the mere residence as a consular officer in a foreign country gives rise to no inference of a domicil in that country. But if one already domiciled and resident in such country accept an office in the consular service of another country, he does not thereby destroy his domicil: *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611; *Urquhart* v. *Butterfield*, 37 C. D. 357.

(*i*) *Craigie* v. *Lewin*, 3 Curt. 435: In that case a native Scotchman, having by employment in the East India Company's service, acquired a domicil in India, it was held that by his return to Scotland, *animo manendi*, his original domicil did not revive, the party still holding his commission and being liable to be called upon to return to India, and intending to return if called on so to do.

(*k*) *Munroe* v. *Douglas*, 5 Madd. 404; *Bruce* v. *Bruce*, 6 Bro. P. C. 566, Toml. Edit.; *Craigie* v. *Lewin*, 3 Curt. 435. This has been so held as to an officer in the Indian army, where the duties of his appointment necessarily require residence in India for an indefinite period, notwithstanding he has property in the country which was his domicil of origin: *Forbes* v. *Forbes*, Kay, 341. But it is otherwise as to an officer in the King's army: *Att.-Gen.* v. *Napier*, 6 Exch. 217. See also *Brown* v. *Smith*, 15 Beav. 444; *Hodgson* v. *Beauchesne*, 12 Moo. P. C. 285. And the rule that a British subject does not by entering into and remaining in the military service of the Crown abandon the domicil which he had when he entered into the service applies to an acquired domicil as well as to the domicil of origin: *Re Macreight*, 30 C. D. 165. See further as to the acquisition of an Anglo-Indian domicil, *Hodgson* v. *De Beauchesne*, 12 Moo. P. C. 285; *Moorhouse* v. *Lord*, 10 H. L. C. 272; *Jopp* v. *Wood*, 34 L. J. (N. S.) Ch. 212; *Allardice* v. *Onslow*, 33 L. J. (N. S.) Ch. 434; *Ex parte Cunningham, re Mitchell*, 13 Q. B. D. 418. An Anglo-Indian is not, for all purposes, an English domicil: *Forbes* v. *Forbes*, Kay, 341. But British subjects resident in Chinese territory cannot acquire in China a domicil similar to that existing in India, and commonly known as Anglo-Indian: *Re Tootal's Trusts*, 23 C. D. 532; nor does permanent abode at Cairo under British protection attract to a man an Anglo-Egyptian domicil: *Abdul-Messih* v. *Farra*, 13 App. Cas. 431. A peer of the British parliament is not incapacitated from acquiring a domicil of choice in a foreign country by reason of his obligation to attend the House of Peers when required: *Hamilton* v. *Dallas*, 1 C. D. 257.

4. A new domicil cannot be acquired by a party's own act during pupilage, nor until the party is *sui juris* (*l*). Accordingly a married woman, though living apart from her husband, has no power to change her domicil (*m*).

5. By marriage, the domicil of the husband becomes that of the wife (*n*), and she retains it after the death of her husband (*o*).

6. After the death of the father, children remaining under the care of the mother follow the domicil which she may acquire, and do not retain that which their father had at his death until they are capable of gaining one by acts of their own (*p*).

(*l*) *Somerville* v. *Somerville*, 5 Ves. 787, by Lord Alvanley; *Forbes* v. *Forbes*, Kay, 341.

(*m*) *Re Daly's Settlement*, 25 Beav. 456. So where a Scotch Court pronounced a decree of divorce in the case of an English marriage, where there was no real Scotch domicil, it was held that the decree had no effect either as a divorce *a vinculo* or *a mensâ et thoro*, so as to render the wife capable of acquiring a domicil different from her husband's: *Robins* v. *Dolphin*, 1 Sw. & Tr. 37; *S. C., nom. Dolphin* v. *Robins*, 7 H. L. C. 390. Whether a wife who is legally divorced *a mensâ et thoro* may acquire a domicil of her own, is not clear: *ibid.* 416, by Lord Cranworth.

(*n*) *Warrender* v. *Warrender*, 2 Cl. & Fin. 488; *Dalhousie* v. *M'Douall*, 7 Cl. & Fin. 817; *Whitcomb* v. *Whitcomb*, 2 Curt. 351. See *The Count de Wall's case*, 6 Moo. P. C. 216. In *De Nicols* v. *Curlier*, [1900] A. C. 21, a Frenchman and Frenchwoman married in France without any contract, so that, according to French law, their rights *inter se* as to property were subject to the law of community of goods. They came to England and were permanently domiciled here. The husband became a naturalised British subject, amassed a large fortune, and died in England, leaving his wife surviving, and having made an English Will, by which he disposed of all his property: It was held that, as to moveable goods, the rights of the wife, under the French marriage law as to community of goods, were not affected by change of domicil, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France. The rule that the law of the matrimonial domicil applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law: *Re Fitzgerald*, [1904] 1 Ch. 573.

(*o*) See Phillimore on the Law of Domicil, Ch. VI. No. XLI. *et seq.*; *Gout* v. *Zimmerman*, 5 Not. of Cas. 440.

(*p*) *Potinger* v. *Wightman*, 3 Mer. 67; *Johnstone* v. *Beattie*, 10 Cl. & F. 66, 138, *per* Lord Lyndhurst, C., and Lord Campbell. But it is only during the mother's widow-

The rule is, however, it appears, subject to the condition that the domicil shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession: And it would seem, by the opinion of an eminent foreign jurist (*q*), that such fraud will be presumed, if no reasonable motive can be assigned for the change.

It must be mentioned, before leaving this subject, that in the case of *Curling* v. *Thornton* (*r*), Sir John Nicholl expressed a doubt whether a British subject is entitled so far *exuere patriam*, as to select a foreign domicil in such complete derogation of his British, as to render his property in this country liable to distribution according to any foreign law. And in the subsequent case of *Stanley* v. *Bernes* (*s*), the same learned judge said, that there was no case in which the property of a British subject, dying intestate in a foreign country, had been held distributable according to the law of such foreign country. But this doubt must be considered as settled by the decision of the delegates in the latter case (*t*), and it is now fully established, with reference to the present subject, that a natural-born British subject may acquire a foreign domicil: and further, that the *animus revertendi*, and claim to be considered, and treatment as, a British subject will not suffice to preserve his original domicil (*u*).

A domicil in India, is, in legal effect, a domicil in the province of Canterbury; and the law of England is therefore to be applied to the distribution of the property of intestates there

hood that she can change the domicil of her infant. See Story's Conflict, s. 506, note (1). The change in domicil of the infant is not, however, to be regarded as the necessary consequence of a change in the mother's domicil, but as the result of the exercise by her of a power vested in her for the welfare of her infant, which in the infant's interest she may abstain from exercising, even when she changes her own domicil: *Re Beaumont*, [1893] 3 Ch. 490. Whether a mere guardian, not being a parent, can change the domicil of his ward, in respect of the right of succession to his estate, is a disputed point. See Story's Conflict, s. 505 *et seq.*; Phillimore, Ch. VII.

(*q*) Pothier, in the introductory chapter to his Treatise on the Custom of Orleans.

(*r*) 2 Ald. 17.

(*s*) 3 Hagg. 441.

(*t*) See *ante*, p. 276.

(*u*) 3 Hagg. 373; *Moore* v. *Darell*, 4 Hagg. 346.

domiciled (*x*). At all events the laws of England and India are now the same as regards the validity of Wills; for shortly after the passing of the new Statute of Wills (1 Vict. c. 26), an Act was passed by the Legislature in India, assimilating the law of India in respect of Wills to that of England (*y*).

24 & 25 Vict. c. 121. No British subject dying in a foreign country to be deemed to have acquired a domicil unless resident there for one year immediately preceding his or her death, &c.; and for all purposes of testate or intestate succession shall retain the domicil possessed at the time of going to reside in such foreign country.

By stat. 24 & 25 Vict. c. 121, s. 1: "Whenever her Majesty shall by convention (*z*) with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the *London Gazette* no *British* subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country, unless such *British* subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council), a declaration in writing of his or her intention to become domiciled in such foreign country: and every *British* subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to movables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid."

Sect. 2. No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicil unless resident therein for one year immediately preceding his or her death, &c.

Sect. 2. "After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that no subject of any such foreign country, who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident

(*x*) *Ante*, p. 1266, note (*k*), where the question of Anglo-Indian domicil is discussed.

(*y*) See *Craigie* v. *Lewin*, 3 Curt. 441.

(*z*) As no convention with any foreign state has as yet been entered into, this statute is at present inoperative.

within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed and deposited with her Majesty's Secretary of State for the Home Department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession."

SECTION VI.

Of the Payment of the Residue.

The subject of the duties of an administrator, with respect to the payment of the residue of an intestate's estate, has been in a great measure anticipated by the discussion of the duties of an executor with regard to the payment of the residue under a testamentary disposition of it.

For example, there has already been occasion to consider the subject with respect to the right of retainer by the administrator, in part or full satisfaction of a debt due to the intestate from the party entitled in distribution (*a*): Again, the law with respect to the payment of a residue, where a party entitled to a distributive share is an infant (*b*); or a married woman (*c*), has been considered in a previous part of this Treatise, incidentally to the subject of the payment of legacies.

If a person entitled to distribution die within the year, his executor, &c., may claim.

Although the 8th section of the statute enacts, that no distribution of an intestate's effects shall be made until one year be expired after his death, yet if a person entitled to a distributive share shall die within the year, such interest shall be considered as vested in him, and shall go to his personal representative: for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors (*d*): The statute also is in the nature of a Will framed by the Legislature for all such persons as die without having made one for themselves; and, by consequence, the parties entitled in distribution resemble a residuary legatee; and it has been always held, that if such legatee dies before the amount of

(*a*) *Ante*, p. 1049 *et seq.*
(*b*) *Ante*, p. 1137 *et seq.*
(*c*) *Ante*, p. 1154 *et seq.*
(*d*) *Brown* v. *Farndell*, Carth. 51, 52; Bac. Abr. Exors. I. 4.

the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator (*e*).

(*e*) Bac. Abr. Exors. I. 4; *Cooper* v. *Cooper*, L. R. 7 H. L. 53, where it was held that the rule of the Statute of Distributions, which requires the conversion of an intestate's estate into money, was introduced simply for the benefit of creditors and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of the creditors) is complete. A residuary legatee under a Will has a clear and tangible interest in the residue, and the Statute of Distributions being nothing but a Will made by the legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a Will; and see *ante*, p. 1193, note (*e*).

CHAPTER THE SECOND.

OF DISTRIBUTION UNDER THE CUSTOMS OF LONDON AND YORK, &c.

THE fourth section of the Statute of Distributions provides, that the Act shall not in any way prejudice the customs of the city of London, or the province of York, or other places, but that they should be observed as formerly.

Although, therefore, by subsequent statutes, mentioned in an earlier part of this Work (*a*), the restraint on testamentary dispositions in those places has been removed, and the customs may be thereby controlled at the pleasure of a testator: yet if a man died intestate, before December 31st, 1856, the customs remained in the same force, with respect to the distribution of his personal estate, as if no statutes had ever passed.

19 & 20 Vict. c. 94. Customs of London and York abolished, as to the estates of persons who have died on or after Jan. 1, 1857.

But by stat. 19 & 20 Vict. c. 94, the 4th section of the Statute of Distributions is repealed, save only with respect to the distribution of the personal estate of persons who may have died on or before December 31st, 1856, "and the special customs respecting the distribution of the personal estates of intestates observed in the city of London, or in relation to the citizens and freemen of such city, and in the province of York, and certain other places, shall, with reference to all persons dying on or after January 1st, 1857, wholly cease and determine, and the distribution of the personal estates of all persons so dying shall take place as if such customs had never existed, and as if the rules for the distribution of the personal estates of intestates generally prevalent in the province of Canterbury had prevailed throughout England and Wales, any law or statute to the contrary notwithstanding." It has been deemed advisable

(*a*) *Ante*, p. 2.

to omit in the present Edition of this Work (as in the 9th Edition) any discussion in detail of distribution as it existed under the customs of London and York, &c., which were abolished by the above Act. As, however, these customs remain in force and affect the distribution of the estates of persons who have died before January 1st, 1857, the reader is referred to the earlier Editions of this Work, Pt. III. Bk. IV. Ch. 2, where the nature and incidents of the customs which have been abolished are investigated at length.

PART THE FOURTH.

OF THE LIABILITIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF ASSETS.

HAVING investigated in a former part of this Work (*a*) the quantity of the estate which devolves to an executor or administrator, it remains, 1st, to consider what portion of that property is regarded in law as applicable by him to the satisfaction of the different claimants on the estate, as well upon valuable consideration as volunteers: and, 2ndly, to complete the examination already commenced in an earlier stage of this Treatise (*b*), of the order in which that application must be made, with reference to the priority subsisting among the claimants (*c*).

The property which will be the subject of these two inquiries, is called *assets* in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and a legatee or party in distribution, so far as such property extends.

This portion of the estate of the deceased is sometimes designated by the older writers by the term "*assets enter mains*," in contradistinction to "*assets per descent*," by which last expression is denoted that portion which descended to the heir, and which was sufficient to charge him, as far as it went, with specialty debts of his ancestor.

(*a*) *Ante*, p. 485 *et seq.*

(*b*) *Ante*, p. 751 *et seq.*

(*c*) This subject is of less importance than formerly by reason of the priority of specialty debts having been taken away by 32 & 33 Vict. c. 46.

Important changes in the law on this subject have been effected by Part I. of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), which came into operation on January 1st, 1898, and it will be convenient here to set out Part I. of this Act in full, although the several sections are dealt with in other parts of this Work.

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

PART I.

Establishment of a Real Representative.

Devolution of legal interest in real estate on death.

1.—(1.) "Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives (*d*) or representative (*e*) from time to time as if it were a chattel real vesting in them or him.

(2.) "This section shall apply to any real estate over which a person executes by Will a general power of appointment, as if it were real estate vested in him (*f*).

(3.) "Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (*g*).

(4.) "The expression 'real estate,' in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*h*).

(*d*) The real estate vests in all the executors, whether they prove the Will or not, unless in the latter case by renunciation or otherwise they have made it impossible for them to obtain a grant of probate; and the executors who have proved the Will have no power to convey the legal estate without either the concurrence of or disclaimer by the other executor who has not proved: *Re Pawley and London & Provincial Bank*, [1900] 1 Ch. 58. But general executors of the testator's real estate in England can sell and make a good title without the concurrence of special executors appointed of property situate in a foreign country or in the colonies: *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

(*e*) Section 24 (2) provides "In this Act, the expression 'personal representative' means an executor or administrator."

(*f*) Cf. *post*, p. 1302, as to the exercise of a general power of appointment over a fund.

(*g*) *Ante*, p. 301.

(*h*) See Watkins on Copyholds, 4th edit. by Coventry, vol. i. p. 58, note (1).

(5.) "This section applies only in cases of death after the commencement of this Act (*i*).

Provisions as to administration.

2.—(1.) "Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees (*k*) for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*l*).

(2.) "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real (*m*), and as respects the dealing with chattels real before probate or administration (*n*), and as respects the payment of costs of administration and other matters in relation to the administration of personal estate (*o*), and the powers, rights, duties and liabilities of personal representatives in respect of personal estate (*p*), shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

(3.) "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies (*q*).

(*i*) Section 25 provides that the Act shall come into operation on the 1st January, 1898.

(*k*) As to what extent executors or administrators are considered trustees, see *post*, p. 1609.

(*l*) See *ante*, pp. 1107, 1192.

(*m*) *Ante*, p. 509 *et seq.*

(*n*) *Ante*, p. 220 *et seq.*

(*o*) *Post*, pp. 1552, 1667 *et seq.*

(*p*) *Ante*, p. 694 *et seq.*

(*q*) The settled practice of the Chancery Division, as stated in *Re Middleton*, 19 C. D. 552, that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate, has not been altered or affected by this Act: *Re Jones*, [1902] 1 Ch. 92. Nor does this Act confer any new right of retainer

(4.) "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate (*r*).

Provision for transfer to heir or devisee.

3.—(1.) "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay (*s*), all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance (*t*).

(2.) "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) "Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them, unless the transfer is for valuable consideration.

(4.) "The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered

or priority in favour of the personal representative as against real assets: *Re Williams*, [1904] 1 Ch. 52.

(*r*) *Ante*, pp. 324, 326.

(*s*) Where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which the executors had no notice at the date of the conveyance to the devisees: *Re Cary and Lott's Contract*, [1901] 2 Ch. 463; *ante*, p. 1194.

(*t*) As to assent by executors, see *ante*, p. 1101.

land shall authorize the registrar to register the person named in the assent as proprietor of the land.

Appropriation of land (*u*) in satisfaction of legacy or share in estate.

4.—(1.) "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the Will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court (*x*).

(2.) "Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) "In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land.

Liability for duty.

5. "Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof" (*y*).

(*u*) This section applies to personal estate as well as real estate: *Re Beverly*, [1901] 1 Ch. 681.

(*x*) As to appropriation and the effect of this section, see *ante*, p. 1194.

(*y*) See *post*, pp. 1696, 1697.

CHAPTER THE FIRST.

OF PERSONAL ASSETS, LEGAL OR EQUITABLE.

What shall be said to be assets in the hands of an executor:

THE general rule with respect to what shall be said to be assets in the hands of an executor or administrator to charge him is thus laid down in a book of authority (*a*): "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."

assets which were never in the testator:

There are many instances in which property in the hands of an executor is regarded as assets, although it was never in the testator: Thus if an executor renew a lease, he shall account for the new lease, as well as the old, as assets (*b*); and this even though the new lease to the executor may comprise additional property to that included in the testator's lease and at an increased rent (*c*). So if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets (*d*). So if A. promises, on good consideration, to deliver

by contract:

(*a*) Touchst. 496.

(*b*) *Anon.*, 2 Ch. Cas. 208; *Bromfield* v. *Chichester*, 2 Dick. 480; *James* v. *Dean*, 11 Ves. 392; *Randall* v. *Russell*, 3 Meriv. 190. See also *Fitzroy* v. *Howard*, 3 Russ. C. C. 225; *Giddings* v. *Giddings*, *ibid.* 241; *Fosbrooke* v. *Balguy*, 1 M. & K. 226.

(*c*) *Re Morgan*, 18 C. D. 93.

(*d*) Wentw. Off. Ex. 188, 14th edit.; *Chapman* v. *Dalton*, Plowd. 286; Com. Dig. Assets, (C).

to B. by such a day certain wares or merchandises, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages, for not performing, would have been (*e*).

by remainder: Again, chattels which were never vested in the testator in possession, but accrue to the executor by remainder, will be assets in his hands: Thus, if a lease be made to one for life, remainder to his executor for years (*f*), such remainder will be assets in the hands of the executor, though it were never in the testator (*g*). So where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A., although B. never had this term in him, it shall be assets in the hands of his executor (*h*). So a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor; for it bears a present value, and is vendible (*i*).

by increase: So goods which have accrued by increase since the testator's death are assets in the hands of the executor: Thus, if the sheep or other cattle of the testator bear lambs, &c., after the testator's death, these, although never the property of the testator, will be assets (*k*). So if the executor of a lessee for years enter into the tenements, the profits, over and above the rent, shall be assets (*l*). Therefore, if an executor has a lease for years of land of the value of 20*l.* a year, rendering rent of 10*l.* a year, it is assets in his hands only for 10*l.* over and above the rent (*m*). Again, if an executor employ the testator's goods in trade, the profits shall be assets (*n*): And whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the

(*e*) Wentw. Off. Ex. 188, 14th edit.; Com. Dig. Assets, (C).

(*f*) See *ante*, p. 529.

(*g*) Wentw. Off. Ex. 189, 14th edit.; Com. Dig. Assets, (C).

(*h*) *Ibid.*

(*i*) *Ibid.*

(*k*) Wentw. Off. Ex. 190, 14th edit.

(*l*) *Buckley* v. *Pirk*, 1 Salk. 79; Wentw. Off. Ex. 190, 191, 14th edit. But the profits, as far as the amount of the rent, are received by the executor as tertenant, and appropriated to the use of the lessor: 1 Salk. 79. See *post*, p. 1390 *et seq.*

(*m*) *Body* v. *Hargrave*, Cro. Eliz. 712; Godolph. Pt. 2, c. 24, s. 1. A leasehold estate, though not sold, is assets *ad valorem*: *Jury* v. *Woodhouse*, Barnes, 333; *Vincent* v. *Sharpe*, 2 Stark. 507.

(*n*) Godolph. Pt. 2, c. 24, s. 4; Com. Dig. Assets, (C). See *post*, p. 1491.

deceased (*o*), or by direction of the testator, contained in his Will, or under the direction of the Court of Chancery, the profits of such trade shall be assets, for which he shall be accountable (*p*). Thus in *Gibblett* v. *Read* (*q*), Lord Hardwicke held, that a share in a newspaper should be considered as the personal property of the deceased, transmissible to his representatives, and that the profits of printing the same subsequent to his death should be distributed accordingly. And his Lordship said, that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate (*r*); as in the instance of physical secrets or nostrums, where everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator (*s*).

(*o*) Generally speaking, the death of a partner, of itself, dissolves the partnership: *Vulliamy* v. *Noble*, 3 Meriv. 614. And even where the partners have covenanted that they and their respective executors shall continue partners for a certain time yet unexpired, the executors of the late partner are entitled to a decree for a dissolution, subject to their liability to damages recoverable in an action by the surviving partners, for a breach of the covenant: *Downs* v. *Collins*, 6 Hare, 418. Sect. 33 (1) of the Partnership Act, 1890, provides that, subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death of any partner.

(*p*) As to the duty of the executor or administrator with regard to the business of the deceased, see *post*, p. 1554, and as to the rights and liabilities of the executor or administrator carrying on the business of the deceased, see *post*, pp. 1555, 1635.

(*q*) 9 Mod. 459.

(*r*) See also *Moseley* v. *Rendell*, L. R. 6 Q. B. 338; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346.

(*s*) His Lordship further observed that if the house of the testator were a house of great trade, the executor must account for the value of what is called the goodwill of it. See also *Worral* v. *Hand*, Peake, N. P. C. 74, accord. So an assignment by deed of the goodwill of a trade has been held to be a conveyance of "property" within the Stamp Act: *Potter* v. *Commissioners of Inland Revenue*, 10 Exch. 147. But in *Spicer* v. *James*, Rolls, M. T. 1830, cited in Collyer on Partnership, p. 82, where an attorney having died intestate, another attorney, a friend of the family, by arrangement with the widow, took out administration, and continued the business of the deceased until her son came of age, paying the widow half the profits, Sir J. Leach held that the goodwill of a trade of a personal nature, as that of an attorney, was not a subject of administration, and was not assets

So, in *Pitt* v. *Pitt* (*t*), the administratrix of a deceased rope-maker in the king's yard at Woolwich was cited in the Prerogative Court of Canterbury, to exhibit an Inventory and account: The deceased had four apprentices; and the question was, whether the administratrix was bound to insert in the Inventory the amount of the wages earned by them, in the yard of the deceased, since his death: And Sir G. Lee was clearly of opinion, that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased; and the learned judge accordingly decreed her to charge herself with the profits arising from the apprentices.

by condition: So chattels, real or personal, to which the executor becomes entitled, after the death of the testator, by force of a condition,

in the hands of the administrator. See, however, *contrà*, *Smale* v. *Graves*, 3 De G. & Sm. 706. With respect to the goodwill of a business, in which several are partners, it seems that, as to a partnership between professional persons, on the death of one the goodwill shall survive to the other, although the deceased paid a large premium on entering into the partnership: *Farr* v. *Pearce*, 3 Madd. 78. But whether this survivorship of the goodwill exists in the case of commercial partnerships has been questioned. In *Hammond* v. *Douglas*, 5 Ves. 539, Lord Loughborough determined that the goodwill of a trade carried on in partnership without articles survives, and is not partnership stock. But in *Crawshay* v. *Collins*, 15 Ves. 227, Lord Eldon doubted the propriety of that decision. See also *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Wedderburn* v. *Wedderburn*, 22 Beav. 84, 104, in which last case it was laid down by Romilly, M. R., that the goodwill does not survive unless by express agreement. See also accord. *Smith* v. *Everett*, 27 Beav. 446. In Lindley on Partnership, 6th edit. p. 445, it is stated that the modern authorities are wholly opposed to the notion that the value of the goodwill, as such, belongs to the survivor, although it may happen that the survivor may obtain the benefit of the goodwill without paying for it; for he is at liberty (unless restrained by agreement) to carry on business on his own account. But though these cases establish that the goodwill is a valuable and tangible thing in some cases, yet the legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the executor: *Robinson* v. *Quiddington*, 28 Beav. 529. In a suit for the general administration of assets, if it be ascertained that the executors have been able so to deal with the business, as to make something of the goodwill, the legatee may have a right to be paid in respect of his interest in it: *Ibid.* As to the restrictions against soliciting old customers by the vendor of the goodwill of a business, see *Trego* v. *Hunt*, [1896] A. C. 7; and *Curl Brothers, Ltd.* v. *Webster*, [1904] 1 Ch. 685.

(*t*) 2 Cas. temp. Lee, 508.

will be assets: As where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c., and this condition is broken or not performed after the testator's death, the chattel will be brought back to the executor, and be assets (*u*). The law is the same where the condition is, that the testator shall pay money or do any other act to avoid the grant: Accordingly, it has been decided, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid on their redemption (*x*). And it was held at N. P. by Abbot, C. J. (*y*), that a lease which belonged to an intestate, upon which the plaintiff had a lien, on account of which he retained it in his hands, was nevertheless to be considered as assets in the hands of the administrator, who had the power to redeem it. But if the executor redeem with his own money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets (*z*).

property of the testator shall be assets in whatever part of the

"Assets in any part of the world," says the author of the *Touchstone* (*a*), "shall be said to be assets in every part of the world." So it was laid down by Lord Lyndhurst, in delivering

(*u*) Wentw. Off. Ex. 181, 14th edit.

(*x*) Wentw. Off. Ex. 182, 14th edit.; *Hawkins* v. *Lawse*, 1 Leon. 155; *Harecourt* v. *Wrenham*, or *Harwood* v. *Wrayman*, Moore, 858; 1 Roll. Rep. 56, pl. 32; 1 Brownl. 76; 1 Roll. Abr. 920, (G.) pl. 5; *Alexander* v. *Lady Gresham*, 1 Leon. 225. A testator being indebted to R., deposited with him a policy of insurance on the testator's life, as security for the debt, and for a further advance then made by R.; and died, leaving R. & M. his executors: R., still holding the policy, applied to the insurers for the amount due on it (200*l.*), which they refused to pay unless R. & M. gave a receipt for it as executors: They did so, R. making protest that he signed as executor merely to satisfy the insurers: In an action by a judgment creditor, the executors pleaded *plene administraverunt* except as to 4*l.* (the surplus out of the 200*l.* after payment to R.): And the Court of King's Bench held, that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R.: *Glaholm* v. *Rowntree*, 6 Ad. & Ell. 710.

(*y*) *Vincent* v. *Sharpe*, 2 Stark. N. P. C. 507.

(*z*) Wentw. Off. Ex. 182, 14th edit.

(*a*) Touchst. p. 496.

world they are situate:

the judgment of the Barons of the Exchequer in *The Attorney-General* v. *Dimond* (*b*), that "the effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets." Again, it was laid down by Bayley, B., in the case *Re Ewin* (*c*), that if the testator or intestate dies entitled to stock in the French or other foreign funds, and there is a deficiency of assets in this country to meet the debts of the deceased, it is the duty of the executor or administrator to sell the stock, and bring the proceeds into this country, in order to satisfy the creditors: and if he neglects to do so, he will be guilty of a *devastavit* (*d*). Accordingly, as early as the reign of James I., in *Dowdale's Case* (*e*), where the jury found that assets within the kingdom of Ireland came to the hands of the executor, it was resolved that the finding the assets to be beyond sea was surplusage; for that if executors have goods of their testators in any part of the world, they shall be charged in respect of them; since many merchants and other men, who have goods to a great value beyond sea, are indebted here in England: and it would be a great defect in the law, that those goods should not be liable to their debts.

But this doctrine has been questioned. In *Story's Conflict of Laws* (*f*), that eminent writer, in commenting on the resolution in *Dowdale's Case*, says, "This language, in its broad import, is certainly unmaintainable in our day; for it goes to the extent of making a domestic executor or administrator liable for all assets of the testator or intestate which are locally situate abroad; although (as it has appeared in an earlier part of this Work) (*g*) he has not, in virtue of the domestic letters of administration, any authority to collect them, or to compel payment or delivery thereof to himself."

(*b*) 1 Crompt. & Jerv. 370.

(*c*) *Ibid.* 151.

(*d*) So it has been laid down that a leasehold estate for years in Ireland is personal assets in England, and may be sold here by the executor: *Bligh* v. *Lord Darnley*, 2 P. Wms. 622. And where there was a question as to the quality of an estate in land situate in a foreign country, the Court of Chancery referred it to a Master, to inquire whether the testator's interest in it was in its nature real or personal: *Gardiner* v. *Fell*, 1 Jac. & Walk. 24.

(*e*) 6 Co. 47 b.; *S. C.*, Cro. Jac. 55.

(*f*) Ch. XIII. sect. 514, a.

(*g*) See *ante*, pp. 273, 337.

In *Dowdale's Case*, it will be observed, the foreign assets had actually come to the hands of the executor; so that the more general question, embraced by the terms of the resolution, did not, in truth, arise. But Mr. Justice Story doubts the authority of the case, even in the aspect which the actual facts of it present; observing that according to the doctrine maintained in England in modern times, the executor was not at all liable to be sued in England as executor under letters testamentary taken out in Ireland; and *à fortiori* not for assets received and administered in Ireland under that appointment: And that learned Commentator considers it as at least a doubtful question, whether if an executor or administrator, appointed in the country where the deceased died, should collect assets in a foreign country without obtaining a grant of administration there, the assets so received would constitute a part of the home assets which he would be bound to administer, and for which he would be liable to account under the domestic administration according to the domestic laws.

Administration granted in different countries: principal administration that granted by country of domicil: estate must be administered in the country where possession is taken.

It has certainly been established (as there has already been occasion to show) (*h*), that although where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country of the domicil of the deceased, yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority: And that the administrator under a foreign grant has a right to hold the assets received under it against the home administrator, even after they have been remitted to this country (*i*). The only

(*h*) *Ante*, p. 338.

(*i*) *Ante*, pp. 338, 340, 1258; Story's Confl. Ch. XIII. sect. 518. See, however, *Sandilands* v. *Innes*, 3 Sim. 263. In that case it appeared, that Erskine Nimmo died intestate at Madras; and William Fairlie, a creditor of the deceased, took out letters of administration to him in the Supreme Court there: Fairlie afterwards came to England, and obtained letters from the Prerogative Court of Canterbury: Afterwards one of the intestate's next of kin procured the latter administration to be revoked, and letters to be granted to himself: He then filed a bill against Fairlie, praying for an account of the effects of the intestate, both in India and in this country, which had been possessed by Fairlie: It was objected, that the bill being filed by the plaintiff in the character of personal representative only of the deceased, and not also as one of the next of kin, he was not entitled to sue for an account of the assets of the deceased possessed by Fairlie in India, but only of the assets possessed by him

mode, it seems, of reaching such assets is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled (*k*). Again, though the right of the home executor or administrator to an ancillary probate or grant of administration in a foreign country is usually admitted, by the comity of nations, as a matter of course (*l*), yet this new administration is made subservient to the rights of creditors and other claimants resident within the country where it is granted; and the *residuum* is transmissible to the country of the home administration only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found within its jurisdiction (*m*).

Relation of principal administration to that granted in foreign country.

Liability of executor to account for assets out of England.

The liability of an executor or administrator to account for assets out of England would seem to depend upon his relation to the foreign assets. It would seem from the decision in *Ewing* v. *Orr-Ewing* (*n*), that where the same person has vested in him English and foreign assets, then, whether the English administration be major or minor, principal or ancillary, the English Courts of Equity, if called upon so to do by a person entitled to claim in the administration, will, if the administrator be within the jurisdiction, judicially administer the whole of the assets vested in him. In a case where one has not only identity of trustees with the legal personal representatives here and abroad and unity of the trust which they have to perform, as was the case in *Ewing* v. *Orr-Ewing*, there is no difficulty, and the whole estate can be administered, as regards both English and foreign assets, in the English Courts; where, however, the only title of the English personal representative is under an English probate or letters of administration to the English assets, the administration, beyond that which is necessary

in this country: Sir L. Shadwell, V.-C., said, that if Fairlie had brought any of the intestate's assets from India to this country, the plaintiff would clearly be entitled to have an account taken as to them; and that the taking of that account would, incidentally, make it necessary to have an account taken of all the assets possessed by Fairlie or his agents in India. See also *Hervey* v. *Fitzpatrick*, Kay, 421, *ante*, p. 341; *Maclaren* v. *Stainton*, 16 Beav. 279.

(*k*) Story's Confl. Ch. XIII. sect. 518; *ante*, p. 754.

(*l*) See *ante*, pp. 273, 337 (*o*).

(*m*) *Eames* v. *Hacon*, 18 C. D. 347; Story's Confl. Ch. XIII. sect. 513; *ante*, pp. 754, 755.

(*n*) 9 A. C. 34.

for the payment of English creditors, may not conveniently be conducted by the English Courts, especially if the deceased is of foreign domicil and those entitled to the surplus of his estate after the payment of his debts are foreigners; in such a case the surplus of English assets after payment of all debts proved in England, might properly be ordered to be paid over to the administrator in the country of the deceased's domicil. Where, however, the deceased is of English domicil, the English Courts assume the power to make a general decree for administration of the whole estate of any testator or intestate who may have died leaving assets in several countries in respect of which several grants of probate or administration (whether principal or ancillary), might have been obtained, working out such a decree in the best way practicable as to assets not within the local jurisdiction. Lord Selborne in delivering his opinion in the House of Lords in *Ewing* v. *Orr-Ewing* (*o*), cited with approval the 589th section of Story on Equity Jurisprudence, Chap. IX.: "Courts of Equity of the country where the ancillary administration is granted (and other Courts, exercising a like jurisdiction in cases of administration), are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the funds, whatever may be their domicil, whether it be that of the testator or intestate, or be in some other foreign country. The question whether the Court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicil of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of their jurisdiction." But, as already stated, wherever there are two sets of personal representatives, one appointed by the tribunal of the country where the testator was domiciled, and another, and a different set of persons, appointed representatives in another country where there happens to be personal

(*o*) 10 A. C. at p. 514 (H. L. Sc.).

estate, questions will arise as to what are the rights of the executors in the country of the domicil as against the ancillary administrator, and when, and at what stage, the trustees and executors of the country of domicil require the ancillary administrator to hand over to them the assets collected under the ancillary administration (*p*). It would seem that wherever you have assets within the jurisdiction, and a person accountable for those assets also within the jurisdiction, a Court of Equity will, if called upon so to do, make a general decree for judicial administration, even though there may be assets abroad and the deceased be of foreign domicil, but that the English Courts in the course of the English action will not allow proceedings to be carried further than is convenient according to the comity of Courts, and would adopt the proceedings of the Courts of the country of the domicil of the deceased according to the necessities and exigencies of the case (*q*). The English Court could, of course, if there was pending a suit in the Courts of the country of the deceased's domicil, in which all questions, which could arise in the course of the administration, could be decided, stay the English action and prevent it going on here vexatiously and unnecessarily (*r*).

Duty of personal representative of person with foreign domicil acting in this country under subsidiary grant of administration.

It has sometimes been asserted that the duty of the personal representative of a deceased of foreign domicil acting here under a subsidiary grant of administration is to pay the creditors and duties in the state under whose authority he is acting, and to remit the balance to the personal representative in the state or country of the domicil of the deceased, and an argument is sought to be based on this assertion that the Courts of a country other than that of the domicil of the deceased ought not judicially to administer assets not comprised in the subsidiary grant, even though the administrator or trustee of these goods happen himself to be within the jurisdiction of the Courts of the country from which the subsidiary grant issues and amenable to it. The case, however, of *Re Kloebe* (*s*), seems to shew that the assertion on which the argument is founded is itself without foundation, for it was decided in that case by Pearson, J., that in the administration of the English estate of

(*p*) See *per* Cotton, L. J., in *Re Orr-Ewing*, 22 C. D. 456, 467.

(*q*) *Stirling Maxwell* v. *Cartwright*, 11 C. D. 522.

(*r*) See *per* Cotton, L. J., in *Re Orr-Ewing*, 22 C. D. 456, 469.

(*s*) 28 C. D. 175.

a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors. In the case of *Re Boyse* (*t*), it was held by Malins, V.-C., that although judgment has been given for the administration of an estate, the Court has no power to restrain a foreign creditor from proceeding in a foreign Court against the administrator; but that if judgment were obtained in the foreign Court against the administrator by default, it would only be treated in the administration action as *primâ facie* evidence of the debt.

By whom assets may be recovered by process of law.

Generally nothing which is assets can be recovered by process of law except by the administrator acting under the authority issuing out of the Court whose process is sought to be enforced (*u*); but there are some apparent exceptions to that rule: one is where assets have come into the jurisdiction by being remitted to the agent of a foreign administrator: in such a case the foreign administrator may sue his agent without taking out letters of administration in the country to the forum of which he is resorting. Thus, in *Eames* v. *Hacon* (*x*), where an intestate died domiciled in Ireland, and letters of administration were granted in Ireland, and the Irish administratrix instructed her attorneys to procure letters of administration in India for her use and benefit, and they did so, and having received the Indian assets, and paid the Indian debts, and remitted the net proceeds to their agents in England, it was said by Jessel, M. R., and Baggallay, L. J., that the Irish administratrix would have been entitled to sue the agents in England even if she had not had the Irish letters of administration resealed. Again, in *Re Macnichol* (*y*), it was held that where judgment had been obtained in a foreign Court by the foreign administrator of a creditor against an English debtor who had since died and whose estate was being administered in England, the foreign administrator could prove without taking out English administration to his intestate.

Law governing administration of assets of deceased person with foreign domicil.

If, however, the English Courts do undertake the judicial administration of assets of a deceased person of foreign domicil, they will administer such assets generally, as far as they can ascertain the law, according to the law of the deceased's domicil, the *lex domicilii*, but the priorities of creditors will be

(*t*) 15 C. D. 591.

(*u*) *Fernandes' Executors' Case*, L. R. 5 Ch. 314.

(*x*) 18 C. D. 347.

(*y*) L. R. 19 Eq. 81.

governed by the *lex fori.* Thus, in *Blackwood* v. *The Queen* (z), it was held by the Privy Council that although the law of the testator's domicil governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are for the purpose of legal representation, of collection and administration, as distinguished from distribution among the successors, governed by the law of their own locality, and not by that of the testator's domicil.

What assets shall be considered as *come to hand* so as to charge the executor:

The general rule has long been established, that an executor or administrator shall not be charged with any goods as assets other than those *which come to his hands* (a). But considerable difficulty exists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator: It is said in *Wentworth's Office of an Executor* (b) that if the testator at the time of his death has a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, and his executor dwells at Coventry, viz., far from all these places, the executor has such an actual possession presently upon the testator's death, that he may maintain trespass against any stranger taking them away or spoiling them; and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such a coming of these goods to his hands as to charge him with payment of debts and legacies, and make his own goods liable instead of them. However, it was laid down by Lord Holt, in *Jenkins* v. *Plombe* (c), that if an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any converter of them, and the damages recovered shall be assets in his hands, yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers (d).

Again, a question arises whether goods which come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, shall be considered assets in his hands: There are some authorities for asserting that things taken out of the possession of the executor are assets

(z) 8 A. C. 82.

(a) *Read's Case,* 5 Co. 33, b, 34, a.

(b) P. 227, 14th edit.

(c) 6 Mod. 181.

(d) See also Com. Dig. Assets (D).

in his hands (*e*), unless they were taken by the Queen's enemies (*f*). But it would seem that an executor or administrator stands in the condition of a gratuitous bailee, with respect to whom the law is, that he is not to be charged without some default in him (*g*). Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not be charged with these as assets (*h*).

Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit: But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him (*i*). Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (*k*). So if the testator's sheep or other beast die, or if his ships perish by tempest, the executor shall not be charged with them as assets (*l*).

Choses in action how far assets.

With respect to that part of the estate of an executor or administrator which consists of *choses in action*, the law has long been settled, that although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money (*m*): So if

(*e*) *Read's Case*, 5 Co. 34, a; *Bethell* v. *Stanhope*, Owen, 132.

(*f*) Wentw. Off. Ex. 234, 14th edit.

(*g*) Wentw. Off. Ex. 235, 14th edit.; Com. Dig. Assets (D).

(*h*) *Jones* v. *Lewis*, 2 Ves. Sen. 240; *Job* v. *Job*, 6 C. D. 562; Wentw. Off. Ex. 236, 14th edit.; Com. Dig. Assets (D). A contrary rule was said to prevail at law prior to the Judicature Act. See *Crosse* v. *Smith*, 7 East, 258, 259. Now, however, the rule at law and in equity is the same (Judic. Act, 1873, sect. 25, sub-sect. 11), and an executor is not chargeable except in the case of wilful default: *Job* v. *Job*, *ubi supra*. See *post*, pp. 1444, 1445.

(*i*) *Jenkins* v. *Plombe*, 6 Mod. 181, 182; *Wightwick* v. *Lord*, 6 H. L. C. 234, 235, *per* Lord Wensleydale.

(*k*) *Jenkins* v. *Plombe*, 6 Mod. 181.

(*l*) Wentw. Off. Ex. 236, 14th edit.; Com. Dig. Assets (D); *post*, p. 1444.

(*m*) Com. Dig. Assets (D); Bac. Abr. Exors. (H) 2.

the executor or administrator recovers any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator (*n*), or with himself in his representative character (*o*), all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted (*p*): but he shall not be charged with them until he has reduced them into possession (*q*): Thus in *Williams* v. *Innes* (*r*), in order to prove assets in the hands of the defendants, who were executors, an account rendered by them was given in evidence, in which they stated that 1,000*l.* had been awarded as due to the testator's estate from a person who had been jointly concerned with him in underwriting policies of insurance: But Lord Ellenborough held, that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors.

But such debts or damages will be regarded as assets, although never, in point of fact, received, if they be released by the executor: for the release, in contemplation of law, shall amount to a receipt (*s*). So if the executor take an obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is a *quasi* payment (*t*).

And it has been laid down, that where an executor sues for money had and received to his use as executor, the debt or

(*n*) Co. Litt. 144, a; 1 Roll. Abr. 920, Exors. (G), pl. 4, 5; Godolph. Pt. 2, c. 24, ss. 1, 2; Bac. Abr. Exors. (H) 2; Com. Dig. Assets(C).

(*o*) See *ante*, p. 661 *et seq.*

(*p*) Wentw. Off. Ex. 191, 14th edit. If the testator recover a judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets when received; but the sum due for costs to the executor is only by way of indemnity to himself, and is not assets: *per* Parke, B., in *Smedley* v. *Philpot*, 3 M. & W. 586. The present practice is to obtain leave to issue execution under Ord. XLII. r. 23. See *post*, p. 1603.

(*q*) Godolph. Pt. 2, c. 24, s. 5; *Jenkins* v. *Plombe*, 1 Salk. 207; 11 Vin. Abr. 239, 240. See also *Lowe* v. *Peskett*, 16 C. B. 500.

(*r*) 1 Campb. 364.

(*s*) *Cocke* v. *Jenner*, Hob. 66; *Brightman* v. *Keighley*, Cro. Eliz. 43.

(*t*) *Norden* v. *Levit*, 2 Lev. 189; *Hosier* v. *Arundell*, 3 Bos. & Pull. 7; *Partridge* v. *Court*, 5 Price, 419—421; *Sparkes* v. *Restal*, 22 Beav. 587.

damages is assets immediately: for if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such a consent, that, upon judgment obtained, it shall be assets immediately, without execution (*u*).

This subject will be further discussed hereafter, when the nature of a *devastavit* by an executor or administrator is concerned (*x*).

Next avoidance of a church.

There may be personal property of the testator or intestate, to which his personal representative, as such, is entitled, which is not assets in his hands, by reason of not being vendible: For example, the patron of a church grants to the testator the next avoidance, and the church becomes void; and the testator dies before he presents: After his death his executor presents, and has the benefit of preferring his son or his friend: Yet this shall make no assets in his hands; because he could not lawfully take money to present (*y*). But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets (*z*): And if the testator had died before the church had become void, then, because the executor might lawfully have sold it, it should seem that he will be charged with the value as assets, if he has neglected a proper opportunity to make a sale (*a*).

Office for years.

A grant for years of an office is assets in the hands of the executor or administrator of the grantee (*b*).

Estates *pur autre vie.* Before the Wills Act.

With regard to estates *pur autre vie* of any person dying before January 1st, 1838, the law applicable thereto will be found in the earlier Editions of this Work.

(*u*) *Jenkins* v. *Plombe*, 1 Salk. 207; *S. C.*, 6 Mod. 181.

(*x*) *Infra*, Pt. IV. Bk. II. Ch. II. § II., p. 1434 *et seq.*

(*y*) Wentw. Off. Ex. 173, 14th edit.; Godolph. Pt. 2, c. 24, s. 8. See also Lord Tenterden's judgment in *Rennell* v. *Bishop of Lincoln*, 7 B. & C. 195.

(*z*) Went. Off. Ex. 173, 14th edit.; Godolph. Pt. 2, c. 24, s. 8; *Sale* v. *Bishop of Lichfield*, Owen, 99; *Smallwood* v. *Bishop of Lichfield*, 1 Leon. 205.

(*a*) Wentw. Off. Ex. 173, 14th edit. See the Benefices Act, 1898 (61 & 62 Vict. c. 48), as to the amended law relating to restrictions on transfer of patronage rights.

(*b*) *Sir George Reynel's case*, 9 Co. 97, a; *Schellinger* v. *Blackerby*, 1 Ves. Sen. 347.

Since the Wills Act.

With regard to estates *pur autre vie* of any deceased person, who shall have died on or since January 1st, 1838, the statute 1 Vict. c. 26, after repealing the sections of the statutes of 29 Car. II. c. 3, and 14 Geo. II. c. 20, dealing with such estates, and enacting, by sect. 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament, proceeds to enact, by sect. 6, that "if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate" (*c*).

1 Vict. c. 26, s. 6.

The terms of the last conveyance of an estate *pur autre vie* and not the original grant must be looked to in order to ascertain whether it is to go to the heir as special occupant or to the legal personal representative (*d*). Where an equitable estate *pur autre vie* limited to a testator, his heirs and assigns, was devised to trustees, their heirs and assigns, for the use of A., it was held by Swinfen Eady, J., that, though the entire estate passed to A., his heir was not entitled to claim as special occupant, and that the estate passed to his administrator under the above section of the Wills Act (*e*).

An estate *pur autre vie* in real estate (*ee*) vested in any person dying on or after January 1st, 1898, now devolves by virtue of sect. 1 of the Land Transfer Act, 1897, to his personal repre-

(*c*) This section applies to equitable estates in land, see *ante*, p. 517; *Reynolds* v. *Wright*, 2 De G. F. & J. 590; 25 Beav. 100; *Earl of Mountcashell* v. *More-Smyth*, [1896] A. C. 158; *Re Sheppard*, [1897] 2 Ch. 67; *ante*, p. 517, note (*c*).

(*d*) *Earl of Mountcashell* v. *More-Smyth*, [1896] A. C. 158, 165.

(*e*) *Re Inman*, [1903] 1 Ch. 241.

(*ee*) But see s. 1 (4), *ante*, p. 1275.

sentatives or representative, who, subject to the powers, rights, duties and liabilities mentioned in the Act shall, under sect. 2 (1), hold the real estate as trustees for the persons by law beneficially entitled thereto.

The effect of these statutes is not to convert estates *pur autre vie* in land into pure personalty or moveables. It is merely that such estates are in some cases to be applied in the same manner as personal estate. The result is that exemption from the duties imposed by the Legacy Duty Acts cannot be claimed in respect of such estates when they form part of the estate of a person having a foreign domicil on the ground that "*mobilia sequuntur personam:*" neither can exemption be claimed on the ground that such estates are real property and therefore not within the Legacy Duty Acts, for by sect. 6 of the Wills Act, 1837, it is provided that such estates shall be assets in the hands of the executor or administrator and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate; and by 36 Geo. III. c. 52, s. 20, estates *pur autre vie* applicable by law in the same manner as personal estate shall be charged with the duties thereby imposed as personal estate (*f*). Sect. 5 of the Land Transfer Act, 1897, provides that nothing in Part I. of the Act shall affect any duty payable in respect of real estate, or impose on real estate any other duty than is now payable in respect thereof.

Property in testator as trustee:

The absolute property of goods must have been vested in the testator, in order to make them assets in the hands of the executor (*g*). Therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor (*h*).

So, too, all property vested in the testator as sole trustee which devolves to and becomes vested in his executors will not of course be assets in their hands.

Conveyancing Act, 1881, s. 30.

In the case of the death of a sole trustee after December 31st, 1882, sect. 30 of the Conveyancing Act, 1881, provides that:— "Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments,

(*f*) See *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192.

(*g*) Bac. Abr. Exors. (H) 1. See *Parker* v. *Baylis*, 2 B. & P. 78.

(*h*) *Deering* v. *Torrington*, 1 Salk. 79. In *Byrn* v. *Godfrey*, 4 Ves. 6, it was held that a promissory note given to the testator was assets, notwithstanding his declaration to his executor that he never meant to call for payment of it.

corporeal or incorporeal, is vested on any trust or by way of mortgage, in any person solely, the same shall on his death notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and, accordingly, all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers."

Copyhold Act, 1894, s. 88.

Sect. 88 of the Copyhold Act, 1894 (re-enacting a similar section in the Act of 1887), provides that sect. 30 of the Conveyancing Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage. And sect. 1 (4) of the Land Transfer Act, 1897, excludes from the expression "real estate," as used in the Act, land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*i*).

Sect. 10 of the Trustee Act, 1893 (replacing sect. 31 of the Conveyancing Act, 1881), does not enable a sole surviving trustee of a Will to appoint by his Will special executors for the purpose of executing in continuation to himself the trusts of the Will of the original testator (*k*).

Terms attendant on the inheritance of testator.

It is necessary in this place to advert to the nature of terms attendant on the inheritance (*l*). When a term for years before December 31st, 1845, was created for a particular purpose, as

(*i*) See *ante*, p. 1275.

(*k*) *Re Parker's Trusts*, [1894] 1 Ch. 707, *ante*, p. 177.

(*l*) But by stat. 8 & 9 Vict. c. 112, after December 31st, 1845, all terms attendant on the inheritance shall determine, unless for the purpose of protection in certain cases against incumbrances. See *Cottrell* v. *Hughes*, 15 C. B. 532; *Plant* v. *Taylor*, 7 H. & N. 211; *Owen* v. *Owen*, 3 H. & C. 88.

Prior to Dec. 31, 1845.

for raising money for payment of debts, or portions for younger children, and the purpose for which the term was created was satisfied, the termor was considered in equity as a trustee for the owner of the inheritance; and though at law the term was deemed a term in gross in such trustee, yet in equity it followed the fee, and was looked upon as completely consolidated with it (*m*): Hence it was not regarded as personal assets in the hands of the executor of the person entitled to the fee, but as real assets which went to his heir (*n*). Yet this must not be understood of every term which attended the inheritance: for where a termor purchased the freehold and inheritance, and took a conveyance thereof in the name of a trustee, although the term in himself was attendant on his equitable fee simple, yet, at his death, it was assets in the hands of his personal representatives (*o*).

Fund for specific purposes not general assets.

It must be observed, that executors or administrators cannot be in a better condition, with respect to the estate of the deceased, than he himself would have been in; and therefore they cannot employ as general assets property which he would have been bound to apply to a particular purpose (*p*): Thus, in *Hassall* v. *Smithers* (*q*), a remittance in bills and notes for a specific purpose, viz., to answer acceptances, was received by an administrator, in consequence of the death of the party to whom the remittance was made: and it was held, that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

Other instances may occur, where personal property may be in the hands of the executor, and yet not applicable to any but a special purpose: Thus, in *Parry* v. *Ashley* (*r*), the testator charged his real estate, which consisted of one house only, with an annuity to his widow, and subject to that annuity he devised it to Sarah Ashley in fee, and appointed her his executrix: The testator had insured the house; and on the expiration of the

(*m*) See Watk. Convey. 48, note by Morley and Coote.

(*n*) *Tiffin* v. *Tiffin*, 1 Vern. 1; *Thruxton* v. *Att.-Gen.*, 1 Vern. 341.

(*o*) *Dowse* v. *Percival*, 1 Vern. 134; *Thruxton* v. *Att.-Gen.*, 1 Vern. 341; *Gunter* v. *Gunter*, 23 Beav. 571. See also *Belaney* v. *Belaney*, L. R. 2 Eq. 210; 2 Ch. 138.

(*p*) See *per* Lord Ellenborough in *Taylor* v. *Plumer*, 3 M. & S. 578; and *per* Littledale, J., in *Ashby* v. *Ashby*, 7 B. & C. 453.

(*q*) 12 Ves. 119.

(*r*) 3 Sim. 97.

policy a few months after his death, it was renewed by Sarah Ashley: The house was afterwards burnt down: And Sir L. Shadwell, V.-C., held, that as she, being executrix, renewed the policy, it must be taken that she did so in the character of executrix (*s*): But his Honour was of opinion, that the proceeds of the policy could not be considered as part of the testator's personal estate, but that they were affected with a trust for the benefit of the parties interested in the real estate (*t*).

Property assigned in fraud of creditors.

Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in (*u*). An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor (*x*). The question as to what is, and what is not, a fraudulent conveyance against creditors, does not fall within the scope of this Work.

Equitable assets in the hands of an executor.

Hitherto the subject has been confined to the consideration of personal assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a debt, due from the testator, might bring forward in evidence on an issue joined on the executor's plea of *plene administravit:* But there are, besides, various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets at law; and which, therefore, if administered at all, must be administered in equity: This latter portion of the estate in the hands of an executor or administrator is called *equitable assets*, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the Temporal Courts, and were formerly liable to legacies in the Spiritual, by the course of law: equitable assets are such as are liable only by the help of a Court of Equity.

Distinction between legal and equitable assets.

Until quite recently a most important distinction existed with respect to the administration of these two kinds of assets: If

(*s*) It may here be mentioned that it has been held that an executor in trust has a sufficient interest to enable him to make an insurance in his own name on the life of a person who has granted an annuity to the testator: *Tidswell* v. *Ankerstein*, Peake, N. P. C. 151.

(*t*) See also *Cruikshank* v. *Roberts*, Madd. & Geld. 104; *Thacker* v. *Wilson*, 3 A. & E. 142; *Smedley* v. *Philpot*, 3 M. & W. 573, for other instances of assets in the hands of executors not being regarded as part of the general personal estate.

(*u*) *Richardson* v. *Smallwood*, 1 Jac. 552.

(*x*) *Shears* v. *Rogers*, 3 B. & Ad. 362; *Shee* v. *French*, 3 Drew. 716.

they were legal, they must have been administered by the executor or administrator of the deceased in a due course of administration, having regard to those rules of priority among creditors which have already been investigated in this Treatise (*y*): But if the assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet, as among creditors, the assets must be applied in satisfaction of all the claimants *pari passu*, without any regard to the priority in rank of one debt to another: The principle of this distinction is, that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or by simple contract: Therefore, since a claimant upon equitable assets is under the necessity of going to a Court of Equity in order to reach them, that Court will act only according to the rule of doing justice to all creditors, without any distinction as to priority (*z*).

Distinction less important since 1869.

The importance, however, of the distinction between legal and equitable assets has been greatly diminished by two statutes.

32 & 33 Vict. c. 46.

By Hinde Palmer's Act, 1869 (32 & 33 Vict. c. 46), it is enacted (*a*), that—

"In the administration of the estate of every person who shall die on or after January 1st, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal or is otherwise made or constituted a specialty debt, but all creditors of such person as

(*y*) *Ante*, p. 751 *et seq.*

(*z*) *Plunket* v. *Penson*, 2 Atk. 294. It was decided by Hall, V.-C., that the separate estate of a married woman in earnings, under the Married Women's Property Act, 1870, which "shall be deemed and taken to be property held and settled to her separate use," became upon her death equitable assets, and divisible amongst her creditors *pari passu*: *Re Poole's Estate*, 6 C. D. 739. But in the case of *Shattock* v. *Shattock*, L. R. 2 Eq. 182, 194, Lord Romilly, M. R., had expressed his opinion that, in the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of priority, and not *pari passu*. Now, under the Act of 1882, s. 1 (1), she is capable of acquiring, holding, and disposing, by Will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee. See also *post*, p. 1302, note (*o*).

(*a*) See *ante*, p. 771, as to the effect of this Act.

well specialty as simple contract shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person whether such assets are legal or personal, any statute or other law to the contrary notwithstanding: Provided also that this Act shall not prejudice or affect any lien or charge or other security which any creditor may hold or be entitled to for the payment of his debt."

38 & 39 Vict. c. 77, s. 10.

And by stat. 38 & 39 Vict. c. 77, sect. 10 (Judicature Act, 1875) (*b*), it is enacted that—

"In the administration by the Court of the assets of any person who may die after the commencement of this Act (November 1st, 1875) and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

It should be noticed that with regard to persons who died before January 1st, 1870, the old rules as to priority in administration remain applicable, and as to persons dying after that date and before November 1st, 1875, the old rules would still apply except that specialty and simple contract creditors stand on the same footing.

Test whether assets are legal or equitable.

It must be observed that the true test, as to whether the assets are legal or equitable, is not whether the executor or administrator, but whether the *claimant* can reach them without resorting to a Court of Equity.

Whether the equity of redemption of a term of years is equitable or legal assets in the hands of an executor or administrator has been much discussed, and the reader is referred to the cases in the note below (*c*).

Equities of redemption not neces-

It appears to be the better opinion at this day, that equities of redemption are not necessarily equitable assets (*d*). And in

(*b*) See *ante*, pp. 759, 772, as to the effect of sect. 10 of this Act.

(*c*) *The Creditors of Sir Charles Cox*, 3 P. Wms. 342; *Hartwell* v. *Chitters*, Amb. 308; *Sharpe* v. *Scarborough*, 4 Ves. 541; *Clay* v. *Willis*, 1 B. & C. 364; Wentw. Off. Ex. 14th edit. p. 186.

(*d*) See 2 Jarman on Wills, 4th edit. 623; Story on Equity, Ch. ix. s. 551, note (1).

the view of an eminent writer (*e*), the more accurate statement of the doctrine is, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration; or in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets. So, in the case of *Cook* v. *Gregson* (*f*), Kindersley, V.-C. (applying the test whether the executor or administrator would take simply *virtute officii*), held that an equity of redemption on a mortgage of a sum of money charged on a real estate was legal assets: And his Honour said, that he thought the cases above cited as to mortgages for terms for years could not be supported. In the later case of *Shee* v. *French* (*g*), the same learned judge laid down that the question whether assets are legal or equitable depends on this, whether, if the case were before a Court of Law, on an issue of *plene administravit*, that Court would treat the property as assets, and the principle on which a Court of Law proceeds is to inquire whether the property came to the hands of the executors *virtute officii:* If it did, the Court of Law regards it as assets, applicable to the payment of the testator's debts; and then a Court of Equity treats it as legal assets (*h*).

sarily equitable assets.

With respect to that portion of the property in the hands of an executor or administrator, which consists of the proceeds of the sale of real estate, it was long ago settled that such proceeds were *equitable* and not legal assets (*i*).

Proceeds of sale of real estate equitable assets.

And it is quite clear that the testator cannot alter the legal character of the property, by directing that it shall be considered as part of his personal estate (*k*). The price, however, of an estate contracted by the testator to be sold and afterwards received by the executor was legal and not equitable assets, since the executor was entitled to and did receive the purchase-money as executor by virtue of the probate (*l*).

(*e*) Story on Equity, Ch. ix. s. 551.

(*f*) 20 Jur. 510; 3 Drewr. 547.

(*g*) 3 Drewr. 716.

(*h*) See *Att.-Gen.* v. *Brunning*, 8 H. L. C. 243, 256, 264, 265; *Christy* v. *Courtenay*, 26 Beav. 140; *Mutlow* v. *Mutlow*, 4 De G. & J. 539.

(*i*) *Clay* v. *Willis*, 1 B. & C. 364; *Barker* v. *May*, 9 B. & C. 489; *Bain* v. *Sadler*, L. R. 12 Eq. 570. The case of *Lovegrove* v. *Cooper*, 2 Sm. & G. 271, is not law.

(*k*) See *per* Lord Tenterden, in *Barker* v. *May*, 9 B. & C. 489.

(*l*) *Att.-Gen.* v. *Brunning*, 8 H. L. C. 243, reversing the decision

Marshalling of assets, partly legal and partly equitable.

Rights of legal preference are, however, controlled by a rule which formerly, before the stat. 32 & 33 Vict. c. 46, put specialty and simple contract creditors on an equality, was of great importance, and which is even now occasionally applicable, as for instance where a creditor executor has partly paid himself by retainer. The rule is that where the assets are partly legal, and partly equitable, though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him until there is an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets (*m*).

Beneficial interest under a power.

Where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or Will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors at his death, in preference to the claims of his legatees or appointees (*n*), and having regard to the Married Women's Property Acts, 1882 and 1893, the law seems now the same as regards married women (*o*).

of the Exchequer, 4 H. & N. 94. Where a testator devised a freehold house to A., whom he appointed one of his executors charged with a sum of money payable within twelve months, this was held *equitable* assets in the hands of the executors: *Lowe* v. *Peskett*, 16 C. B. 500; *ante*, p. 1058, note (*b*).

(*m*) *Morrice* v. *Bank of England*, Cas. temp. Talb. 220, by Lord Talbot; *Chapman* v. *Esgar*, 1 Sm. & G. 575; *Bain* v. *Sadler*, L. R. 12 Eq. 570; *ante*, p. 784.

(*n*) *Thompson* v. *Towne*, 2 Vern. 319; *Hinton* v. *Toye*, 1 Atk. 465; *Bainton* v. *Ward*, 2 Atk. 172; *Townshend* v. *Windham*, 2 Ves. Sen. 9; *Pack* v. *Bathurst*, 3 Atk. 269; *Troughton* v. *Troughton*, 3 Atk. 656; *George* v. *Milbanke*, 9 Ves. 190; *Jenny* v. *Andrews*, 6 Mad. 264; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *Williams* v. *Lomas*, 16 Beav. 1; *Platt* v. *Routh*, 6 M. & W. 789. Moreover, it has been held that resort cannot be had, in any case, to the appointed property, till all the testator's own property has been exhausted: *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.

(*o*) The cases of *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204; *Shattock* v. *Shattock*, L. R. 2 Eq. 182, go to show that where a married woman has property settled upon her for her separate use, she is capable of charging and making it liable to her general debts as if she were a *feme sole;* but if she has only a power she is not capable of charging or making it liable to her general debts, at all events, if the power is one which can be exercised only by Will. These cases seem to have been disap-

But in order to raise this equity, the power must be actually executed; for equity never aids the non-execution of

proved in the *London Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 572; in *Mayd* v. *Field*, 3 C. D. 587; and in *Re Harvey's Estate*, 13 C. D. 216, which was followed in *Hodges* v. *Hodges*, 20 C. D. 749. Kay, J., however, in *Re Roper*, 39 C. D. 482, treated them as good law, and held that an appointment by a married woman by Will, in the exercise of a general power of appointment by deed or Will or by Will only, does not make the appointed property liable to engagements entered into by her on the credit of her separate estate prior to the commencement of the Married Women's Property Act, 1882, and that the exercise of the power did not make the appointed property liable as assets of the appointor. The learned judge, after stating that there is no doubt that in the case of a man who has a general power of appointment, and exercises it by Will in favour of volunteers, the property so appointed will be considered assets for the payment of his debts (as to which statement, see *per* Joyce, J., in *Re Lawley*, [1902] 2 Ch. at p. 677), goes on to put to himself the question: Does this law apply to the case of a married woman? And says, speaking of the law before the Married Women's Property Act, 1882: "It would be strange if the law was that only the separate property which a married woman had at the time (of her engagement) should be liable to the exclusion of separate property acquired afterwards, but that nevertheless the exercise by Will of a general power of appointment would make the appointed fund, which never was her separate property, liable. Even if it could be said to become her separate property by the appointment, this would only be so at her death long after the engagement entered into, and therefore, according to *Pike* v. *Fitzgibbon*, 17 C. D. 454, the appointed property could not be made liable. Suppose she had a general power to appoint by deed or Will, and exercised it by a deed to take effect upon her death, would the appointment be void against her creditors or be an appointment for their benefit under 13 Eliz. c. 5? Or suppose she survived her husband, and exercised the power by Will after his death, would the property then become liable for her engagements during coverture? I think not. A married woman could not contract debts like a person completely *sui juris*. Her engagements only bound her to the extent of her separate property at the time which might be reached by judgment and execution. It follows that when she afterwards exercised the general power, whether by deed or Will, she had no debts which could be made available against it." And the learned judge concludes: "My opinion is that in cases not within the Married Women's Property Act, 1882, whether the power of appointment be by deed or Will, or by Will only, an appointment by the Will of a married woman does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. What the law may be as to cases falling within that Act, I express no opinion save this: that to make

a power (*p*). And although creditors in these cases prevail over volunteers, yet if a party taking under voluntary appointment sell to a person *bonâ fide*, and for a valuable consideration, such person, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors, as having a preferable equity to them (*q*).

property appointed by the Will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her Will makes the property appointed her separate property, because it is only 'all separate property which she may thereafter acquire' which is by that Act rendered liable." In *Ex parte Gilchrist*, 17 Q. B. D. 521, it was held that the expression "separate property" in the Married Women's Property Act, 1882, does not include a general power of appointment by deed or Will of which she is the donee, but which she has not exercised. In *Re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549, Kekewich, J., held that the engagements which were entered into by a married woman during the coverture and which might have been proved against her separate estate, if, at the time of entering into each contract in succession, she had separate estate, may be proved against the property appointed by her Will under her general power. It is to be observed that the judgment of Kay, J., was dealing with a case not within the Married Women's Property Act, 1882, and does not, therefore, take into consideration the effect of sect. 4 of that Act, which provides that: "The execution of a general power by Will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." The Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), provides that—"1. Every contract hereafter entered into by a married woman, otherwise than as agent,

"(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at the time when she enters into the contract;

"(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

As to an unexercised power to bequeath a death allowance out of funds of a friendly society not being assets, see *Ashby* v. *Costin*, 21 Q. B. D. 401.

(*p*) *Holmes* v. *Coghill*, 7 Ves. 499; 12 Ves. 206.

(*q*) *George* v. *Milbanke*, 9 Ves. 190; *Hart* v. *Middlehurst*, 3 Atk. 377; Sugd. Pow. 8th edit. 477.

The donee of a general testamentary power cannot by Will prefer one creditor to another.

In *Re Lawley* (*r*) the donee of a general testamentary power of appointment over a fund borrowed a sum of money, and as security for the loan covenanted forthwith to make a Will exercising the power so that the loan should be a first charge upon the fund; and he made a Will accordingly and died. It was contended that the rule laid down by Knight Bruce, L. J., in *Fleming* v. *Buchanan* (*s*), as being the settled law of the country, that "if a man having a power, and a power only, over personal estate to appoint it as he will, and exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part," only applied where the appointment is to volunteers, and did not apply to the case under consideration. But it was held by Joyce, J., that the applicants had no priority as against the appointed fund over other creditors. This decision was affirmed by the Court of Appeal (*t*), where it was pointed out by Vaughan Williams, L. J., that the position of the lender, in whose favour the power was exercised, is that of a legatee taking by the bounty of the testator; he could not at any time before the death of the testator have asserted any title to or charge on this personal estate. In truth, every one taking under a Will is a volunteer, even though the testator may have been under some contractual obligation to make the appointment. The decision of the Court of Appeal was affirmed by the House of Lords (*u*), where Lord Lindley says that "it cannot now be denied that property appointed by Will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor of the power distributable by the donee thereof. The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. . . . It is settled that, except by making a creditor an executor, a person disposing of his own property by Will cannot by his Will prefer one creditor to another, or make a gift by Will payable before a debt. A covenant to bequeath property by Will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by Will and not a preferential debt. The attempt to confine the rule to

(*r*) [1902] 2 Ch. 673.
(*s*) 3 De G. M. & G. 976, 980.
(*t*) [1902] 2 Ch. 799.
(*u*) [1903] A. C. 411.

volunteers cannot, I think, now be supported when speaking of powers to appoint by Will."

Whether a fund appointed under a general power becomes legal or equitable assets.

Whether a fund appointed under a general power becomes legal or equitable assets for payment of debts is uncertain, having regard to the conflicting decisions in reference to sect. 9 (1) of the Finance Act, 1894. If the appointed fund passes to the executor "as such," within the meaning of that expression as used in this section, estate duty is payable out of the residue; if not, it has to be borne by the appointed fund. In *Re Treasure* (*x*), Kekewich, J., held that the appointed fund does not under such circumstances pass to the executor as such. In *Re Moore* (*y*), Buckley, J., held that the appointed fund under such circumstances does pass to the executor as such. In *Re Maddock* (*z*), Kekewich, J., adhered to his opinion as expressed in *Re Treasure*. In *Re Power* (*a*), Byrne, J., held that the appointed fund does not pass to the executor "as such." In *Re Dixon* (*b*), Buckley, J., says: "In the view which I take of the case [meaning the case then under consideration], therefore, the question does not arise as to the meaning of the words 'executor as such' in sect. 9, sub-sect. 1, and it is unnecessary for me to express any further opinion upon a point on which an unfortunate difference of opinion has arisen. I may add, however, that having had the advantage of reading the considered judgment of my brother Byrne in *In re Power* (*a*), I should, if I had to consider that question again, still be of opinion that it lies at the root of the matter to ascertain whether the property included in the power becomes assets for payment of debts under or adversely to the beneficial disposition made by the donee of the power; in other words, whether fictionally the donee of the power is supposed to appoint first to his executor to such extent as is necessary for payment of his debts in a due course of administration, and then to the appointees, or whether the appointment as a beneficial disposition is taken to be what it is upon its face, namely, an appointment to certain appointees, and the executor's right is a right to recover, not as an appointee, but as executor adversely to the appointees by virtue of his right as executor to avoid *pro tanto* the beneficial disposition of the property which the appointor in fact makes. The latter

(*x*) [1900] 2 Ch. 648.
(*y*) [1901] 1 Ch. 691.
(*z*) [1901] 2 Ch. 372.
(*a*) [1901] 2 Ch. 659.
(*b*) [1902] 1 Ch. 248, 256.

seems to have been the view taken by Lord Hardwicke in *Lord Townshend* v. *Windham* (*c*). Lord Hardwicke, I see, refers to the case in 2 Rolle's Reports, 173, as showing the origin of the right to treat as general assets for payment of debts property included in a general power exercised by the donee. Further, it would, I think, be necessary to deal with the decision of Lord Romilly in *Hayes* v. *Oatley* (*d*), which was a decision upon the point on which James, L. J.'s words in *In re Hoskin's Trusts* (*e*) were but dictum. It is, however, unnecessary for me in the present case to reconsider the point."

(*c*) 2 Ves. Sen. 11. (*d*) L. R. 14 Eq. 1.
(*e*) 6 Ch. D. 281.

CHAPTER THE SECOND.

OF REAL ASSETS: AND OF THE EXONERATION OF THE REAL ESTATE BY THE PERSONAL: AND HEREWITH OF THE MARSHALLING OF ASSETS.

SECTION I.

Of Real Assets, and therewith of the Exoneration of the Real Estate by the Personal.

THE real estate of any person dying after January 1st, 1898, by virtue of the Land Transfer Act, 1897, s. 1, sub-s. (1), now devolves to and becomes vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him: and this section is by sub-sect. (2) made to apply to any real estate over which a person executes by Will a general power of appointment, as if it were real estate vested in him (*a*). Consequently such real estate devolves to and becomes vested in the personal representative *virtute officii* and is legal assets.

Sect. 2 (3) of the Land Transfer Act, 1897, provides as follows: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies" (*b*).

It is still necessary, however, to consider the subject of real assets as discussed in the last Edition of this Work in relation to

(*a*) *Ante*, p. 1275. (*b*) *Ante*, p. 1276.

the estates of persons dying before January 1st, 1898 (the commencement of the Land Transfer Act, 1897); and in respect to copyhold property excepted by sect. 1 (4) from the expression "real estate" as used in the Act (*c*), and also in respect to the order in which real and personal assets respectively are applicable in or towards the payment of funeral and testamentary expenses, debts, and legacies, and the liability of real estate to be charged with the payment of legacies.

Real assets in the hands of the heir:

Besides the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable, at the common law, to the extent of the real assets descended, for the payment of his ancestor's debts of a certain quality; viz., those due on bonds, covenants, or other specialties, in cases where the deceased bound himself and his heirs (*d*). But such real assets were not liable for simple contract debts, nor for specialty debts where the heirs were not expressed to be bound.

of the devisee:

Creditors by specialties which affected the heir, provided he had assets by descent, had not, at common law, the same remedy against the devisee of their debtor. To obviate this mischief, the statute of 3 Will. & Mary, c. 14, passed: which has been repealed and re-enacted with additional provisions calculated to remedy certain omissions in the former statute. By statute 1 Will. IV. c. 47, after reciting that "it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having, by bonds, *covenants* (*e*), or other specialties, bound themselves and their

1 W. IV. c. 47.

(*c*) *Ante*, p. 1275.

(*d*) After the Statute De Donis the heir expressed to be bound was bound only in respect of lands descending to him from the ancestor in fee simple. See Hood and Challis on Conveyancing and other Acts, 6th edit., p. 146. The heir is also liable on a judgment recovered against his ancestor, or a recognizance acknowledged by him: but he is chargeable only as *tenant of the land* and not as heir: and therefore an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestor, but a *scire facias* only to have execution of the lands in his hands: 2 Saund. 7, note (4) to *Jeffreson* v. *Morton*. Although *scire facias* is not in terms abolished by the Judicature Act, yet Ord. XLII. r. 23 is apparently intended to be substituted for it, *post*, p. 1603.

(*e*) The former statute, giving the specialty creditor a remedy against the devisee (3 Will. & Mary, c. 14), did not extend to damages for breaches of covenant or con-

1 W. IV. c. 47.

heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their Wills or testaments, have, to the defrauding of such their creditors, by their last Wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts;" it is, by sect. 2, enacted, "that all Wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons, whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same (*f*) by his, her or their last Wills or testaments, shall be deemed or taken (only as against such person or persons,

For remedying frauds committed on creditors by Wills.

tracts under seal made by the testator; and it was therefore held, that an action of covenant did not lie upon the statute against the heir and devisee to recover damages for a breach of covenant made by the devisor, but the remedy thereby given was confined to cases where debt lies: *Wilson* v. *Knubley*, 7 East, 128. It was further held, in the construction of the old statute, that it applied only where a *debt*, in the ordinary sense of the word, existed between the parties in the lifetime of both; and therefore that an action of debt did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated so that in form they might be sued for in an action of debt: *Farley* v. *Briant*, 3 A. & E. 839. But such damages, though not a debt within this statute, are a debt payable out of the real estate of the testator, under a charge of debts thereon created by his Will: *Morse* v. *Tucker*, 5 Hare, 79. And a debt due on a covenant, though it be *debitum in præsenti solvendum in futuro*, was held to be within the statute: *Coope* v. *Cresswell*, L. R. 2 Eq. 106, *coram* Kindersley, V.-C., L. R. 2 Ch. 112.

(*f*) This statute extends to cases of devisees not only where the devisor is seised in fee, but where he has the power to dispose of the subject-matter of the devise, which in terms includes every beneficial interest which he may possess. And the devisee of an equitable estate seems liable to an action of debt by the creditors of the devisor under the 3rd section of the Act, where the words "such devisee and devisees" can only refer to the 2nd section, which applies to devises of every description of estate, legal or equitable; and upon a judgment obtained in such an action, execution may be taken out against the equitable devisee by the 10th section of the Statute of Frauds: *Coope* v. *Cresswell*, L. R. 2 Ch. 112, 121, *per* Lord Chelmsford.

bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them, with whom the person or persons making any such Wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, *covenant* or other specialty, binding his, her or their heirs), to be fraudulent, and clearly, absolutely and utterly void, frustrate, and of none effect (*g*); any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding." 1 W. IV. c. 47.

Sect. 3. "For the means that such creditors may be enabled to recover upon such bonds, *covenants*, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her and their action and actions of debt or *covenant* upon the said bonds, covenants and specialties against the heir and heirs-at-law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees (*h*), or the devisee or devisees of such first-mentioned devisee or devisees jointly by virtue of this Act: and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended" (*i*). Enabling creditors to recover on bonds, &c.

Sect. 4. "If in any case there shall not be any heir-at-law against whom, jointly with the devisee or devisees, a remedy is If there is no heir-at-law,

(*g*) It is not necessary to make the devise void that the intent of the devise was to defraud or hinder or delay creditors: *Coope* v. *Cresswell*, L. R. 2 Eq. 106.

(*h*) Equitable estates are within the statute, and the devisees, who as trustees have the legal estate, must be made defendants, but if there has been no alienation by them, they, personally, will not be liable, but upon a judgment obtained against them execution may be had against the whole estate. Alienation by the person having the beneficial interest will not prevent the action, but upon a judgment obtained against the legal devisees execution may be had against the whole estate, but if any beneficial interest in it has been *bonâ fide* aliened before action (or rather judgment), equity would prevent the interest so aliened being affected by the execution: *Coope* v. *Cresswell*, L. R. 2 Ch. 112.

The right of a specialty creditor under 1 Will. IV. c. 47, seems to be a legal right. But his right is, until judgment, liable to be postponed to that of a prior alienee, even with merely an equitable title: *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567.

(*i*) The mere liability of the devisee to be sued under this Act does not make the debt his debt: *Re Taylor's Estate*, 8 Exch. 384.

1 W. IV. c. 47.
action may be maintained against the devisee.

hereby given, in every such case, every creditor to whom by this Act relief is given, shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid" (*k*).

Heir-at-law to be answerable for debts although he may sell the estate before action brought.

Sect. 6. "In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments, *bonâ fide* aliened (*l*) before the action brought, shall not be liable to such execution."

Devisees to be liable the same as heirs-at-law.

Sect. 8. "All and every the devisee and devisees made liable by this Act shall be liable and chargeable in the same manner as the heir-at-law by force of this Act, notwithstanding the lands, tenements and hereditaments to him or them devised, shall be aliened before the action brought" (*m*).

(*k*) Under the statute of Will. & Mary, the specialty creditor could not maintain an action against the devisee alone, there being no heir: *Hunting* v. *Sheldrake*, 9 M. & W. 256.

(*l*) A conveyance by old to new trustees is not such an alienation as would prevent the action: nor is a mortgage by an equitable tenant for life such an alienation, though a Court of Equity would protect the mortgaged interests against execution: *Coope* v. *Cresswell*, L. R. 2 Ch. 112.

(*m*) The liability under this Act of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that on the alienation the debts become his own debts to the extent of the land alienated. Consequently where a woman to whom land had been devised, settled it on her marriage, after the passing of the Married Women's Property Act, 1870, the first trust being for herself absolutely until the marriage, and after its solemnization on trust for herself for life without power of anticipation, with remainder on trusts for the issue of the marriage; it was held that the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the

Traders' estates shall be assets to be administered in Courts of Equity.

Sect. 9 made the real property of a deceased trader assets to be administered in Courts of Equity for the benefit of creditors by simple contract or by specialty as they are for the benefit of creditors by specialty where the heirs were bound.

3 & 4 W. IV. c. 104.

The principle was extended further, by the stat. 3 & 4 Will. IV. c. 104, which after reciting that it is expedient that "the payments of the debts of all persons shall be secured more effectually," it is enacted, "that from and after the passing of this Act (August 29th, 1833), when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he shall not by his last Will have charged with or devised subject to the payment of his debts (*n*), the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty (*o*); and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heir-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands" (*p*).

Freehold and copyhold estates of persons dying after 29th August, 1833, in all cases to be assets for the payment of simple contract or specialty debts.

deficiency to the extent of the value of the devised land: her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage" within the meaning of sect. 12 of the Married Women's Property Act, 1870: *Re Hedgeley*, 34 C. D. 379.

(*n*) See *Ball* v. *Harris*, 4 My. & Cr. 268.

(*o*) Freeholds, over which a testator has a general power of appointment, and which he appoints by a last Will, are within this Act (but are only applicable as assets after all the testator's own property has been previously so applied): *Fleming* v. *Buchanan*, 3 De G. M. & G. 976. See also *ante*, p. 1302, *post*, p. 1345.

(*p*) It was held formerly that by virtue of this proviso a creditor by bond, in which the heirs are named, must be paid before a creditor by

The statutes 1 W. IV. c. 47, and 3 & 4 W. IV. c. 104, do not specifically charge the real assets, but make the heir or devisee personally liable.

It was held by Sir L. Shadwell, V.-C., in *Spackman* v. *Timbrell* (*q*), that the repealed statutes (3 Will. & Mary, c. 14, and 47 Geo. III. sess. 2, c. 74) did not specifically charge the real assets descended or devised with the debts of the ancestor, but made the heir or devisee liable, *personally*, to answer for the value of the assets descended or devised: Therefore where H., who was a trader at his death, and indebted by specialty and simple contract, devised freehold estates to his son in fee; and the son, on his marriage, settled the estates on his wife and children, and afterwards died, his Honour decided that the son's widow and children were entitled to hold the estates discharged from the debts of the father. So in *Richardson* v. *Horton* (*r*), a settlement by the heir, upon his marriage, of the ancestor's estates was supported against the claims of the specialty creditors of such ancestor: And Lord Langdale, M. R., laid down that, though by taking proper proceedings, the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee, yet if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. And there does not appear to be any reason why these decisions should not be applied to the construction of the statutes now in operation (1 Will. IV. c. 47, and 3 & 4 Will. IV. c. 104) (*s*).

bond in which they are not named: *Richardson* v. *Jenkins*, 1 Drewr. 477; *Foster* v. *Handley*, 1 Sim. N. S. 200; *Re Burrell*, L. R. 9 Eq. 443; but this proviso would seem in effect to be repealed by Hinde Palmer's Act, 32 & 33 Vict. c. 46, which, however, would seem to leave untouched the rights of a specialty creditor on a specialty binding the heir who has obtained judgment prior to the commencement of the administration action: *Re Illidge*, 27 C. D. 478.

(*q*) 8 Sim. 253.

(*r*) 7 Beav. 112.

(*s*) See the observations of Lord Cottenham in *Pimm* v. *Insall*, 1 Mac. & G. 449, 458; of Romilly, M. R., in *Kinderley* v. *Jervis*, 22 Beav. 21, 22. See also *Dilkes* v. *Broadmead*, 2 Giff. 113; and *Price* v. *Price*, 35 C. D. 297, 305. In the latter case it was held that a creditor's action for general administration may be a sufficient *lis pendens*, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the *lis pendens*, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; but that a mere general claim for administration of the real and personal estate is insufficient. A covenant by an infant heiress and

Neither at law nor in equity is any charge created until judgment is obtained, and, the claim of a creditor under 3 & 4 Will. IV. c. 104, being a claim under an administration in equity, a prior equitable alienee will take precedence over the equitable judgment creditor (*t*). A simple contract creditor cannot get a judgment under 3 & 4 Will. IV. c. 104, giving him a priority; he can only get a judgment as against the heir-at-law, which will put the Court in a position to administer the real estate for the benefit of all the creditors, and under that judgment all the simple contract creditors would rank *pari passu* amongst themselves (*u*).

Primary liability of personal estate to debts of every description:

It is, however, a well-known rule, that, as between the real and personal representatives of all deceased persons, the personal estate in the hands of the executor or administrator is the primary and natural fund, which must be resorted to in the first instance for the payment of debts, of every description, contracted by the testator or intestate.

But it is clear that this principle can only regulate the

her intended husband, in marriage articles, to settle the descended estate on the issue of the marriage, is not an alienation such as to withdraw the estate from the claim of the ancestor's creditors: *Pimm* v. *Insall*, 1 Mac. & G. 449; 7 Hare, 193. Nor is a judgment entered up against an heir such an alienation: *Kinderley* v. *Jervis*, 22 Beav. 1. An equitable deposit with memorandum of charge by a legal devisee is an alienation, which *pro tanto* prevents a creditor of a testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. IV. c. 104: *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567. It has been held that the stat. 3 & 4 Will. IV. c. 104, makes the lands themselves, and not merely the estate or interest of the deceased, assets for the payment of his debts. Therefore, if he dies without heirs, they are made assets against the lord claiming by escheat, notwithstanding his right is by title paramount: *Evans* v. *Brown*, 5 Beav. 114; *Downe* v. *Morris*, 3 Hare, 399; *Hughes* v. *Wells*, 9 Hare, 749. It has also been held that the Act charges the real estate of the deceased owner (where no such charge has been made by Will), not only with debts of every description actually due at his death, but also with all liabilities which may result out of the obligations entered into by him during his life: *Hamer's Devisees' Case*, 2 De G. M. & G. 366, overruling the decision in 3 De G. & Sm. 279. See also *Beale* v. *Symonds*, 16 Beav. 406. The widow's right to dower is not affected by the Act: *Spyer* v. *Hyatt*, 20 Beav. 621. As to the proceedings and proper parties for obtaining an order for the administration of the real estate of the deceased, see R. S. C. Ord. LV. r. 4, *post*, p. 1544.

(*t*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567.

(*u*) *Walters* v. *Walters*, 18 C. D. 182.

equitable administration of assets, and does not extend to the legal control of the creditor of the deceased; for in respect to persons dying before the commencement of the Land Transfer Act, 1897 (January 1st, 1898), it is discretionary with the creditor, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised: Hence, if the obligee of a bond bring an action of debt against the heir, the latter cannot plead that there is an executor who has assets (*x*).

In order, therefore, to support and enforce the primary liability of the personal estate, as between the representatives of the deceased debtor, it is an established rule in equity, that if the creditor proceeds against the real estate, descended or devised, the heir or devisee, who has sustained the loss, shall be allowed to stand in the place of the specialty creditor, to reimburse himself out of the personal estate in the hands of the executors (*y*): Provided such reimbursement will not prejudice *any of the creditors, or any other party having a claim equal to or more favoured* than the heir or devisee respectively.

consequent right of heir or devisee to have the real estate exonerated by the personal:

Thus, if the testator enters into a bond for himself and his heirs, and dies, and the obligee proceeds against the heir, and

(*x*) Bro. Assets, per Descent, 33; *Davy* v. *Pepys*, Plowd. 439 *b.*; *Quarles* v. *Capell*, Dyer, 204 *b.*; *Davies* v. *Churchman*, 3 Lev. 189; *Galton* v. *Hancock*, 2 Atk. 426. And since as against the executor personal estate is the primary fund for the payment of debts, it follows that, in a case where the specialty debts exceed the personal estate, the executor can have no right of retainer in respect of a simple contract debt, even though the specialty debts may in fact have been paid out of the proceeds of real estate administered under 3 & 4 Will. IV. c. 104: *Walters* v. *Walters*, 18 C. D. 182. As to the right of retainer, see *ante*, p. 785 *et seq.*

(*y*) Treat. Eq. B. 3, c. 2, s. 1. Accordingly, where a person domiciled in England, who was indebted in money upon bond, died intestate leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland; Lord Langdale, M. R., held, that the right of relief or demand against the personal estate, which, by the law of Scotland is given to the heir who has paid moveable debts, is capable of being made available in England: *Lord Winchelsea* v. *Garetty*, 2 Keen, 293. And in all cases, where, in the course of administrations in different countries, the question arises whether particular debts are properly and ultimately payable out of the personal estate, or are chargeable on the real estate of the deceased, the law of his domicil will govern, in cases of intestacy, and, in cases of testacy, his intention: Story's Confl. Ch. xiii. s. 528.

compels him to pay the debt out of the real assets, the heir may recover it out of the assets in the hands of the executor (*z*). And this exoneration is extended not only to the *hæres natus*, the heir-at-law, but also to the *hæres factus*, the general devisee (*a*), or a particular devisee (*b*).

Again, it is discretionary with a mortgagee, whether he will proceed, for the recovery of his mortgage debt, against the mortgaged land which has come to the heir or devisee of the mortgagor, or against the executor: But if the mortgagee recovers against the land, the heir or devisee is entitled (unless the case is within the operation of the stat. 17 & 18 Vict. c. 113) (*c*) to be reimbursed out of the personal estate of the mortgagor (*d*).

(*z*) *Armitage* v. *Metcalfe*, 1 Chanc. Cas. 74; *Anon.*, 2 Chanc. Cas. 4; Treat. Eq. B. 3, c. 2, s. 1.

(*a*) *Lutkins* v. *Leigh*, Cas. temp. Talb. 54. After *Lutkins* v. *Leigh*, and before Locke King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was, under the Will, entitled as against a residuary legatee to have the mortgage paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of marshalling, the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty: *Re Smith*, [1899] 1 Ch. 371; and see *post*, p. 1342.

(*b*) *Pockley* v. *Pockley*, 2 Chanc. Cas. 84; *Galton* v. *Hancock*, 2 Atk. 436; Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (*e*).

(*c*) *Post*, p. 1324.

(*d*) *Cope* v. *Cope*, 2 Salk. 449. *Howell* v. *Price*, 1 P. Wms. 292; *Johnson* v. *Milksopp*, 2 Vern. 112; *Lutkins* v. *Leigh*, Cas. temp. Talb. 54; *Galton* v. *Hancock*, 2 Atk. 436. And it will make no difference, that the devise is of the lands *subject to the incumbrances thereon*; for such a qualification is no more than what is implied, since the testator could not devise them otherwise: *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Bickham* v. *Cruttwell*, 3 Mylne & Cr. 769; *Hickling* v. *Boyer*, 3 Mac. & G. 643, by Lord Truro. Accordingly where a testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children; it was held, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; because the gift was in effect a gift of the estates, subject to the mortgages; and the gift of an estate subject to a mortgage, does not deprive the devisee of the right

but not to prejudice a person having prior claim to satisfaction.

But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied: And therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets, if by so doing he would disappoint any creditor (*e*) or any legatee, except the residuary legatee (*f*), or the widow's claim to *paraphernalia* (*g*).

It has, indeed, been laid down, as a general proposition, that the equity, to have the personal estate applied to the exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against specific or general legatees (*h*). And this is unquestionably true with respect to the exoneration of the heir (*i*). But it appears to be clear that if a creditor, with a *general* lien on the land, as a mere bond creditor, recovers the bond debt against the real estate *devised*, the devisee will be entitled to exoneration out of the personal estate, to the disappointment of general legacies (*k*). Whether he would also

to satisfaction of the mortgage out of the personal estate: *Wythe* v. *Henniker*, 2 M. & K. 635. But where a testator having an estate subject to a mortgage of 4,460*l.* created by himself, devised it to A. B. in fee, "he paying the mortgage thereon;" and devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagees, through the medium of his executors, 2,000*l.* to exonerate the estate; it was held that the words "he paying the mortgage thereon," imposed a duty on the devisee and amounted to a direction or condition that he should pay the mortgage, or take the estate subject to the burden upon it, so far as the same exceeded 2,000*l.*: *Lockhart* v. *Hardy*, 9 Beav. 379. See also *Goodwin* v. *Lee*, 1 Kay & J. 377; *Hatch* v. *Skelton*, 20 Beav. 453.

(*e*) *Bartholomew* v. *May*, 1 Atk. 487.

(*f*) *O'Neal* v. *Mead*, 1 P. Wms. 693; *Lutkins* v. *Leigh*, Cas. temp. Talb. 53; *Davis* v. *Gardiner*, 2 P. Wms. 190; *Rider* v. *Wager*, 2 P. Wms. 335; *Re Salt*, [1895] 2 Ch. 203; *Re Smith*, [1899] 1 Ch. 365 (*ante*, p. 1317, note (*a*)); *Re Roberts*, [1902] 2 Ch. 834. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold: *Halliwell* v. *Tanner*, 1 Russ. & M. 633; *Wythe* v. *Henniker*, 2 M. & K. 635; *Johnson* v. *Child*, 4 Hare, 87; *Secus*, where a contrary intention is apparent: *Middleton* v. *Middleton*, 15 Beav. 450.

(*g*) *Tipping* v. *Tipping*, 1 P. Wms. 736; *ante*, p. 588, note (*k*).

(*h*) *Hamilton* v. *Worley*, 2 Ves. Jun. 65; Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (*e*).

(*i*) *Lutkins* v. *Leigh*, Cas. temp. Talb. 54; *Snelson* v. *Corbett*, 3 Atk. 369; *Re Smith*, [1899] 1 Ch. 365.

(*k*) It is clear that general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land *devised*. See *post*, p. 1340. And therefore it seems to follow, that

be entitled to exoneration to the disappointment of *specific* legacies, is a question which, for some time, was doubtful (*l*). But it seems to be now settled, that the devisee would be entitled to compel the specific legatees to *contribute* to the payment of the debt, but not wholly to exonerate the land (*m*).

Residuary devise of real estate a specific devise.

Before the Wills Act a residuary devise of real estate was treated as specific. It was at one time supposed that the effect of sect. 24 of that Act, in making Wills speak and take effect with reference to the real and personal estate comprised in them as if executed immediately before the death of the testator, was to alter this and to prevent a residuary devise of real estate being treated as specific (*n*), but it is now established that there is nothing in the Act to alter the well settled rule of law as to the effect of a residuary devise, namely, that for the purpose of payment of debts it is to rank *pari passu* with specific devises (*o*).

the devisee shall be exonerated out of the general legacies; besides, if it were otherwise, it would have the effect of making a devisee of land, who in every case is as much a specific devisee as a legatee of a specific legacy, bear the burden of the debt before the general pecuniary legatees.

(*l*) See *Cornewall* v. *Cornewall*, 12 Sim. 298.

(*m*) *Tombs* v. *Roch*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 654; and see *post*, p. 1341. But the terms of the Will may show that as between the devisee and a specific legatee the testator intended that legatee to have priority. Thus in *Re Saunders-Davies*, 34 C. D. 482, a testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of five hundred years, on trust to raise by mortgage of the real estate or out of the rents and profits, portions of 5,000*l*. apiece for each of his younger children, with remainder in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts, and consequently the specifically bequeathed personal estate, and the real estate had to contribute, and it was held that as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency. The decision in this case seems on this point to be inconsistent with *Long* v. *Short*, 1 P. Wms. 403, but North, J., in his judgment points out, referring to the judgment of Lord Chancellor Brady in *Jackson* v. *Hamilton*, 9 Ir. Eq. 430, that the report of *Long* v. *Short* is inaccurate; *Re Saunders-Davies* was followed by Kekewich, J., in *Re Bawden*, [1894] 1 Ch. 693. See *post*, p. 1341, note (*a*); and cf. *Raikes* v. *Boulton*, 29 Beav. 43.

(*n*) *Dady* v. *Hartridge*, 1 Dr. & Sm. 236; *Barnwell* v. *Iremonger*, *ibid.* 242; *Rotheram* v. *Rotheram*, 26 Beav. 465; *Bethell* v. *Green*, 34 Beav. 302; *Rodhouse* v. *Mold*, 35 L. J. Ch. 67.

(*o*) *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Lancefield* v. *Iggulden*,

The exoneration of the real estate confined to cases where the claim is the *proper debt* of the deceased.

It must be further observed that the exoneration of the real estate out of the personal is confined to cases, where the claim in question is the *proper debt* of the deceased; for if it be not so, his heir or devisee must take the land *cum onere:* Thus if a settlor of real estate in contemplation of marriage covenants for payment of the portions of children, or widow's jointure (*p*), or if a person makes a voluntary gift, by way of charge, and covenants for the payment of the money (*q*), the land will be the primary fund for payment; for in these cases the charge is in its nature real and the covenant only an additional security. Accordingly in *Graves* v. *Hicks* (*r*), a father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money: By his Will he directed his debts to be paid, first out of the residue of his personal estate, then, out of his money in the funds, and lastly, out of his residuary real estates: And Sir L. Shadwell, V.-C., held, that the mortgaged estate was not to be exonerated from the portion out of the personal estate; his Honour being of opinion that, by the plain intention of the parties, the covenant of the father was meant to be auxiliary only to the charge upon his land; and that what he contracted to do, was to give security for the marriage portion (*s*).

Again, if a man buys an estate, subject to an existing mortgage, the land remains the proper fund for its discharge, and the heir or devisee of the purchaser cannot throw the debt on the personal estate, as the primary fund for payment (*t*). So if an estate descends on an heir-at-law (*u*), or is devised (*x*), charged with a mortgaged debt, and the heir or devisee dies, leaving the

L. R. 10 Ch. 136; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371.

(*p*) *Lanoy* v. *Athol*, 2 Atk. 444; *Edwards* v. *Freeman*, 2 P. Wms. 438; *Coventry* v. *Coventry*, 2 P. Wms. 222; *Loosemore* v. *Knapman*, Kay, 123. But see *Field* v. *Moore*, 7 De G. M. & G. 691, where the provision was first secured by a covenant creating a debt to which the covenant for securing the charge was manifestly auxiliary.

(*q*) *Wilson* v. *Darlington*, 1 Cox, 172; *Ex parte Digby*, 1 Jac. 253.

(*r*) 6 Sim. 398.

(*s*) See also *Ibbetson* v. *Ibbetson*, 12 Sim. 206; *Jenkinson* v. *Harcourt*, Kay, 688; *Re Anthony*, [1893] 3 Ch. 498.

(*t*) Coote, Mortg. 1016 *et seq.*, 5th edit.

(*u*) *Noel* v. *Lord Henley*, 7 Price, 241; *S. C.* in Dom. Proc. 12 Price, 213; Coote, Mortg. 1047, 5th edit.; *Re Leeming*, 3 De G. F. & J. 43.

(*x*) *Perkins* v. *Baynton*, 2 P. Wms. 664, note to *Evelyn* v. *Evelyn;* Coote, Mortg. 1047, 5th edit.

debt unpaid, the land will be the fund for its payment, and not the personal estate of the deceased heir or devisee (*y*): In other words, the principle only extends to incumbrances created by the testator or ancestor himself.

And even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to make his personal estate the primary fund for the discharge of the mortgage debt, if the money borrowed was for the purpose of paying off the debts (*z*) or legacies (*a*) of the ancestor or devisor; and the law will be the same, if a bond (*b*) or note of hand (*c*) is given by the heir or devisee for the payment of debts or legacies charged on the land. However, in the case of *Barham* v. *Lord Thanet* (*d*), a mortgage was made of the manor and lands of Silsden and other valuable estates, to secure a debt of 80,000*l.* and interest: The mortgagor died intestate, leaving the debt wholly unpaid; and his heir, being pressed to pay off 30,000*l.* part of the 80,000*l.*, procured a person to advance the sum required for the purpose, and the original mortgagee thereupon joined with the heir of the mortgagor in a deed conveying the manor and lands of Silsden to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption, altogether different from the prior equity of redemption, and the interest reserved being five per cent. instead of four and a half per cent., which was the

(*y*) *Scott* v. *Beecher*, 5 Madd. 96. See also *Lord Ilchester* v. *Lord Carnarvon*, 1 Beav. 209; *Lord Clarendon* v. *Barham*, 1 Y. & C. Ch. C. 688; *Re Taylor's Estate*, 1 Exch. 384; *Swainson* v. *Swainson*, 6 De G. M. & G. 648; *Hepworth* v. *Hill*, 30 Beav. 484, *per* Romilly, M. R.; but in *Bond* v. *England*, 2 K. & J. 44, James E. mortgaged real estate and *died intestate* in 1850, leaving his father, Edward E., his heir-at-law and sole next of kin: Edward E. also died intestate, *and without ever having obtained letters of administration* to his son James: And it was held by Wood, V.-C., that the personal estate of James was liable, as between the heir and personal representative of Edward and James, to be applied in discharge of the mortgage debt.

(*z*) *Tankerville* v. *Fawcett*, 1 Cox, 237; *Perkins* v. *Baynton*, 2 P. Wms. 664 (note to *Evelyn* v. *Evelyn*); Coote, Mortg. 1049, 5th edit.

(*a*) *Basset* v. *Percival*, 1 Cox, 268; *S. C.*, 2 P. Wms. 664, note; Coote, Mortg. 1049, 1050, 5th edit.

(*b*) *Billinghurst* v. *Walker*, 2 Bro. C. C. 604; *Woods* v. *Huntingford*, 3 Ves. 131, by Lord Alvanley; Coote, Mortg. 1050, 5th edit.

(*c*) *Mattheson v. Hardwicke*, 2 P. Wms. 665, note.

(*d*) 3 M. & K. 607. This case was followed by Romilly, M. R., in *Bagot* v. *Bagot*, 34 Beav. 134.

rate reserved in the original mortgage: And it was held by Sir J. Leach, M. R., that it was in effect a new mortgage by the heir, and the 30,000*l.* was thereby constituted his personal debt. In *Townsend* v. *Mostyn* (*e*), the rule was laid down by Romilly, M. R., that where the owner of property adds mortgages of his own to other mortgages created by his ancestor and unites them together, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt.

It must here be observed, that although the debt is not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own:* in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt (*f*).

But it requires clear evidence of intention to make the debt his own: Thus a charge by Will of debts, generally, on his real and *personal* estate, will not be sufficient of itself to shift the *onus* from land which came to him already mortgaged, whether by descent, or by devise, or by sale (*g*). So, in cases where the lands came to the deceased by descent or devise, his concurrence in the deed, and his personal covenant for payment of the money, on assignment or transfer of the mortgage, being only by way of additional security to the mortgagee, will not alter the burthen, as between his real and personal representatives (*h*). The same principle applies, if other estates are added to the security on a further sum being lent (*i*), or if there be a

(*e*) 26 Beav. 76.

(*f*) See *Bruce* v. *Morice*, 2 De G. & Sm. 389.

(*g*) *Lawson* v. *Hudson*, 1 Bro. Chanc. Cas. 58; *Ancaster* v. *Mayer*, 1 Bro. Chanc. Cas. 454; *Hamilton* v. *Worley*, 2 Ves. 62; *Butler* v. *Butler*, 5 Ves. 534; *Lord Ilchester* v. *Lord Carnarvon*, 1 Beav. 290. See *post*, p. 1327 *et seq.*

(*h*) *Bagot* v. *Oughton*, 1 P. Wms. 347; *Evelyn* v. *Evelyn*, 2 P. Wms. 664; *Leman* v. *Newnham*, 1 Ves. Sen. 52; *Barham* v. *Lord Thanet*, 3 M. & K. 607, 622; *Lord Ilchester* v. *Lord Carnarvon*, 1 Beav. 209; *Hedges* v. *Hedges*, 5 De G. & Sm. 330. So where there had been a mortgage of gavelkind lands, which, upon the death of the mortgagee intestate, descended to his two brothers as coparceners, and the elder brother, who was the common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money; it was held that he did not thereby make the mortgage money his personal debt: *Barham* v. *Lord Thanet*, 3 M. & K. 607.

(*i*) *Ancaster* v. *Mayer*, 1 Bro. Chanc. Cas. 454, 464.

covenant on his part for increasing the rate of interest (*k*). And it seems that if the sums borrowed by him, and added to the original mortgage, be comparatively small, equity will not consider that he had different intentions as to the different sums, but will charge the real estate with the whole (*l*). In case the deceased was a purchaser of the equity of redemption, the rule (apart from Locke King's Act, 17 & 18 Vict. c. 113, the application of which may be negatived) may, perhaps, be stated to be, that unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, it will be considered, as between his real and personal representatives, a charge on the land (*m*): And the mere covenanting with the mortgagor to pay the debt will not make it his personal debt (*n*). If, however, the purchaser *borrows* a sum of money to

(*k*) *Shafto* v. *Shafto*, 1 Cox, 607; 2 P. Wms. 664, note.

(*l*) *Lewis* v. *Nangle*, Ambl. 150; *S. C.*, 2 P. Wms. 664, note; Coote, Mortg. 1049, 5th edit. This latter doctrine must, it should seem, be received with much caution: *ibid.*; Robbins on Mortg. Vol. I. p. 760.

(*m*) Sugd. V. & P. 14th edit. 195. Where, however, the deceased described himself, in his Will, as having purchased a property, subject to a mortgage, but it appeared, on an examination of the history of the transaction, that he was the person who owed the money, although, as between himself and the mortgagee, he did not appear as the party who contracted the debt, Lord Cottenham held, that the personal estate was primarily liable: For that if a man borrows money in the name of a trustee, the debt is, in one way or other, his from the commencement, either to the person who advances the money, or to the trustee in whose name it is borrowed: *Bickham* v. *Cruttwell*, 3 My. & Cr. 763.

(*n*) Sugd. V. & P. 14th edit. 195. "I entirely concur," said Sir John Leach, M. R., in *Barham* v. *Lord Thanet*, 3 M. & K. 624, "in the opinions expressed by Lord Alvanley and Sir William Grant, that the purchaser of an estate subject to a mortgage, who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage-money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage-money to be deducted from the price." A distinction has been made between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the purchase, is discounted out of the consideration money; in which latter case it has been considered, the personal estate of the purchaser will be the primary fund: *Parsons* v. *Freeman*,

enable him to complete his contract, and the estate is, on the purchase, limited to the lender either for a term of years, or in fee, by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an existing mortgage (*o*).

[Mr. Locke King's Act.] 17 & 18 Vict. c. 113: After Dec. 31, 1854, heir or devisee of real estate not to claim payment of mortgage out of personal assets.

By stat. 17 & 18 Vict. c. 113, it is enacted that "when any person shall, after December 31st, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his Will or Deed, or other document, have signified any contrary or other intention (*p*), the heir or

2 P. Wms. 664, note (1); *Earl of Belvidere* v. *Rochfort*, 5 Bro. P. C. 299, Toml. edit. But see Coote, Mortg. 1045, 1046, 5th edit.; 2 Jarman on Wills, 5th edit. 1450 *et seq.*

(*o*) *Waring* v. *Ward*, 5 Ves. 670; *S. C.*, 7 Ves. 332; Coote, Mortg. 1045, 5th edit. See also *Marquis of Bute* v. *Cunynghame*, 2 Russ. Chanc. Cas. 275. So where A. B. purchased an estate in consideration of an annuity, which was thereupon charged on the purchase, and also upon another estate, and A. B. covenanted to pay it, his personal estate was held primarily liable for the payment: *Yonge* v. *Furse*, 20 Beav. 380.

(*p*) As to what amounts to a signification of a "contrary or other intention," there were, after the passing of the Act, a series of cases in which it was held that directions by a testator that his debts should be paid out of his personal estate might be sufficient indication of intention on the part of the testator that land should not, under the Act, be primarily liable to the payment of the mortgage debt. The following are some of such cases: *Stone* v. *Parker*, 1 Dr. & Sm. 212; *Smith* v. *Smith*, 3 Giff. 263; *Eno* v. *Tatham*, 4 Giff. 181; 32 L. J. Ch. 311; *Moore* v. *Moore*, 1 De G. J. & S. 603; *Rodhouse* v. *Mold*, 35 L. J. Ch. 67. These decisions led to the passing of 30 & 31 Vict. c. 69 (*post*, p. 1327), expressly enacting that such direction shall not be a sufficient indication, and the cases are therefore of no importance except in the case of testators dying prior to or on December 31st, 1867. Moreover, Locke King's Act Amendment Act, 1877, 40 & 41 Vict. c. 34 (*post*, p. 1328), enacts that, in the case of any testator or intestate dying after December 31st, 1877, such contrary intention shall not be deemed to be signified by a charge of, or a direction for payment of, debts upon or out of residuary real or personal estate or residuary real estate. Lord Romilly, in *Brownson* v. *Lawrance*, L. R. 6 Eq. 1, decided that the fact that one of two properties comprised in the same mortgage is specifically devised was sufficient to exclude the principal Act, and make the estate which passed under the residuary devise *primâ facie* liable to the whole of the mortgage debt; but

devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt dis-

this case cannot, it seems, now be regarded as good law, and Jessel, M. R., in *Sackville* v. *Smyth*, L. R. 17 Eq. 153, refused to follow it; and in a case where a testator dying after 30 & 31 Vict. c. 69, who was entitled to an estate subject to a mortgage, devised part of it to his widow for life, and the remainder to his residuary devisee, and bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate, he held that no contrary or other intention was shown within the meaning of Locke King's Act, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage. And Malins, V.-C., in *Gibbins* v. *Eyden*, L. R. 7 Eq. 371, pointed out that Lord Romilly, in *Brownson* v. *Lawrance*, had probably overlooked the fact that *Hensman* v. *Fryer*, L. R. 3 Ch. 420, had decided that a residuary devise, notwithstanding the Wills Act, was specific. And North, J., in *Re Smith*, 33 C. D. 195, dissented from *Brownson* v. *Lawrance*, and followed *Sackville* v. *Smyth* and *Gibbins* v. *Eyden*. In the case of *Re Newmarch*, 9 C. D. 12, Jessel, M. R., after the passing of 30 & 31 Vict. c. 69, decided that a charge of debts on a part of a testator's real estate, viz., his residuary real estate, in exoneration of the rest, without specially referring to his mortgage debts, is not an expression of a contrary intention sufficient to exonerate the mortgaged estate; and that, as Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons, the devisees, in the absence of a sufficient expression of a contrary intention, must contribute according to the value of their respective portions. And where a testator by his Will, dated in 1877, directed his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate," it was held that a debt due from the testator at the time of his death on a mortgage of part of his real estate must be borne primarily by the mortgaged estate: *Re Rossiter*, 13 C. D. 355. It is to be observed that where real and personal estate are comprised in the same mortgage, there is nothing in Locke King's Act to make the real estate the primary fund to bear the whole mortgage debt: this must depend on the intention of the mortgagor: *Trestrail* v. *Mason*, 7 C. D. 655; *Leonino* v. *Leonino*, 10 C. D. 460. See also *Marquis of Bute* v. *Cunynghame*, 2 Russ. 275; *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. 501; *De Rochefort* v. *Dawes*, L. R. 12 Eq. 540. Where freehold and leasehold lands were mortgaged to secure the same advance by deeds of even date, each of which contained a covenant for payment of the mortgage debt and interest, the leasehold security not being collateral in the sense of secondary it was held that the mortgage debt was payable rateably out of the freeholds and leaseholds, and not primarily out of the freeholds. But otherwise, if on the construction one estate is to be considered as the primary and the other the secondary security: *Re Athill*, 16 C. D. 211.

charged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of

The principal Act was held to apply to equitable mortgages: *Pembrooke* v. *Friend*, 1 Johns. & H. 132; *Coleby* v. *Coleby*, 12 Jur. N. S. 496; but only where there was a defined and specified charge on a specified estate: *Hepworth* v. *Hill*, 30 Beav. 476. The Act was also held to apply to copyholds: *Piper* v. *Piper*, 1 Johns. & H. 91; but not to leaseholds: *Solomon* v. *Solomon*, 33 L. J. Ch. 473; *Re Wormsley's Estate*, 4 C. D. 665. To remedy this the Act of 1877 (40 & 41 Vict. c. 34), *post*, p. 1328, was passed, by which the statutes 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, as to any testator or intestate dying after December 31st, 1877, were held to extend to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money. It has been expressly decided in *Re Kershaw*, 37 C. D. 674, that the effect of this Act is to include leaseholds within the principal Act, and render them subject to a lien for unpaid purchase-money in exoneration of the general personal estate. It has also been held that a rent-charge issuing out of leasehold land is within the provisions of the Act of 1877: *Re Fraser*, [1904] 1 Ch. 111, aff. on app. [1904] 1 Ch. 726. It was held in *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182, in a case where personalty went to the Crown, there being no next of kin, that the Act applied, and the devisee of a mortgaged estate was not entitled to be exonerated out of the personalty notwithstanding the words of the statute "as between the different persons claiming through or under the deceased person." See further as to what is an "interest in land" within the meaning of the statute, *Lewis* v. *Lewis*, L. R. 13 Eq. 218, in which case Malins, V.-C., decided that land devised upon trusts for conversion, and taken in its converted state, is not an interest in land. It is to be observed, however, that his judgment is partly based on the words "heir or devisee" being inapplicable to such a subject-matter, and that now, by 40 & 41 Vict. c. 34, the words "devisee or legatee or heir" are substituted. Personal estate of a testator may *pro tanto* be converted into realty by a contract to purchase real estate, but if he dies without paying the purchase-money, leaving it equitably charged by way of lien on the land, no such conversion is effected, because by 40 & 41 Vict. c. 34, the devisee or heir is not entitled to have the purchase-money discharged or satisfied out of any other estate of the testator or intestate: *Re Cockcroft*, 24 C. D. 94. In the case of *Hudson* v. *Cook*, L. R. 13 Eq. 417, the purchaser had died intestate in 1869, and the case was not therefore affected by 40 & 41 Vict. c. 34, which did not apply the law as to vendor's lien to the case of an intestate dying before December 31st, 1877.

all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof (*q*): Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid, or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any Will, Deed or document already made, or to be made before January 1st, 1855" (*r*).

30 & 31 Vict. c. 69.

In construing Wills general direction for payment of debts out of personalty not

By stat. 30 & 31 Vict. c. 69, sect. 1 (*s*), it is enacted that "in the construction of the Will of any person who may die after the 31st December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate (*t*) shall not be deemed to be a declaration of an intention

(*q*) See *Evans* v. *Wyatt*, 31 Beav. 217; *Trestrail* v. *Mason*, 7 C. D. 655; *Leonino* v. *Leonino*, 10 C. D. 460; and see last note.

(*r*) The heir of an intestate, who before January 1st, 1855, executed a mortgage reserving the equity of redemption to himself and his heirs, is not within this saving clause; for the heir claims by descent and not under any instrument: *Piper* v. *Piper*, 1 Johns. & H. 91. But a Will executed before January 1st, 1855, is a Will "already made" within the meaning of the clause, notwithstanding the testator died after that day. Nor does a mere republication by codicil, giving no new operation to the material dispositions of the Will, deprive it of that character: *Rolfe* v. *Perry*, 32 L. J. Ch. 471. This proviso only extends to a devisee; an heir-at-law taking by descent from an intestate is not within the proviso: *Nelson* v. *Page*, L. R. 7 Eq. 25.

(*s*) "The meaning of sect. 1, though not so happily expressed as it might be, appears to be this, that if a testator wishes to give a direction which shall be deemed a declaration of an intention, contrary to the rule laid down in Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them": *per* Giffard, V.-C., in *Nelson* v. *Page*, L. R. 7 Eq. 25.

(*t*) Although the Act only refers to a direction to pay debts out of personal estate, and says that such a direction shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the Act, yet Jessel, M. R., in *Re Newmarch*, 9 C. D. 12, 18, said: "It is impossible consistently with the Act to hold that a direction to pay them out of real estate, or out of a mixed estate of realty and personalty, does evince such a contrary intention." And this view seems to be embodied in the amending Act, 40 & 41 Vict. c. 34. See also *Elliott* v. *Dearsley*, 16 C. D. 322.

to include mortgage debts unless such intention expressly implied.

contrary to or other than the rule established by the said Act [*i.e.*, Locke King's Act, 1854], unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage (*u*) on any part of his real estate." And by sect. 2 it is enacted that "in the construction of this Act or of the said Act [*i.e.*, Locke King's Act, 1854], the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

40 & 41 Vict. c. 34.

By Locke King's Act Amendment Act, 1877 (40 & 41 Vict. c. 34), it is enacted that the above-mentioned statutes shall "as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditament of *whatever tenure*, which shall at the time of his death be charged (*x*) with the payment of any sum or sums of money by way of mortgage, or any other equitable charge including any lien for unpaid purchase-money (*y*): and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall, within the meaning of the said Acts [*i.e.*, Locke King's Act, 1854, and the Act of 1867 above set forth] have signified *a contrary intention*: and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real or personal estate or residuary real estate."

(*u*) It is not necessary that the debt or debts should be referred to as mortgage debts: all that is required is that the debt should be specifically described and identified in some way. Therefore where a testator directed his private debts to be paid out of the proceeds of certain life policies, and bequeathed the residue of his personalty subject to the payment of his trade debts, and after the date of his Will deposited the title deeds of real estate with his banker to secure an overdrawn trade account, it was held that the direction as to the payment of his trade debts amounted to a declaration of an intention contrary to or other than the rule established by the Act: *Re Fleck*, 37 C. D. 677.

(*x*) Land, which has been delivered in execution under a duly registered writ of elegit to the judgment creditors of a testator, is charged within the meaning of this Act: *Re Anthony*, [1892] 1 Ch. 450; [1893] 3 Ch. 498.

(*y*) See *Re Cockcroft*, 24 C. D. 94; *Re Kidd*, [1894] 3 Ch. 558.

Exoneration of real estate charged with debts and legacies:

It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment (*z*). With respect to the exoneration of the real estate from legacies, the general rule is equally clear as it is with respect to debts, that the personal estate is the first and natural fund for the payment of them; and the real estate is only to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate, yet the personal estate remains undischarged from its primary liability to those claims (*a*).

Exoneration of personal estate:

Accordingly it has long been the settled rule of Courts of Equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes (*b*).

Testator may expressly exonerate

Nevertheless, it is clear, that a testator may, if he pleases, give the personal estate, as against his heir or any other real

(*z*) As to what words will be sufficient to charge the real estate with debts and legacies, see 1 Rop. Leg. 571 *et seq.*, 3rd edit.; 2 Pow. Dev. 644 *et seq.*, Jarman's edit.; 2 Jarman on Wills, 5th edit. c. xlv. pp. 1387 *et seq.* See *ante*, pp. 494, 495.

(*a*) *Davies* v. *Ashford*, 15 Sim. 42; *Roberts* v. *Roberts*, 13 Sim. 336; *Elliott* v. *Dearsley*, 16 C. D. 322, which case must be taken to have overruled the dictum of Jessel, M. R., in *Gainsford* v. *Dunn*, L. R. 17 Eq. 405, on this point: *per* North, J., in *Re Boards*, [1895] 1 Ch. 499. Where, however, the testator directs payment of legacies out of a mixed fund, they are payable rateably out of realty and personalty: *Re Boards*, *ubi supra*; *post*, p. 1336. The rule that a charge of debts on real estate does not of itself exonerate the personal estate, applies to a case where a charge for payment of debts is created by deed: *French* v. *Chichester*, 2 Vern. 568. But no such rule applies to specific personal estate similarly charged, and therefore the charged personal estate must be applied in the first instance to the payment of the debts of the deceased chargor, to the exoneration of his general personal estate in the hands of his personal representative: *Trott* v. *Buchanan*, 28 C. D. 446.

(*b*) *Rhodes* v. *Rudge*, 1 Sim. 84, 85; *Walker* v. *Hardwicke*, 1 M. & K. 396; *Forrest* v. *Prescott*, L. R. 10 Eq. 545. See also *Re Ovey*, 31 C. D. 113; *Heron* v. *Poole*, 42 L. J. Ch. 348.

personal estate.

representative, discharged from the payment of his debts and legacies (*c*): And in such case the rules of exoneration in favour of the heir or the devisee, which have hitherto been the subject of this chapter, altogether fail of application.

What expression by testator sufficient to exonerate personal estate.

A most important question, therefore, arises, viz., what is the mode of expression, on the part of the testator, which will give the personal estate exempt from such payment, in contravention of the ordinary rule that such estate is first liable.

In the earlier cases, it was laid down, that express words of exemption were necessary (*d*): But this rule has been relaxed by subsequent decisions: and it is now settled that the personal fund will be exempted, if the intention of the testator in its favour can be collected from a sound interpretation put upon the whole Will; in other words, if there appears from the whole testamentary disposition, taken together, an intention on the part of the testator so expressed, as to convince a judicial mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal (*e*).

It is obvious, therefore, that it is impossible to lay down any general rule as a guide upon this question; since the construction of every Will, in which the point arises, must depend merely upon the individual circumstances of the particular case: and in these, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between the most eminent judges who are called on to consider the circumstances. The difficulty with which the whole subject is surrounded is demonstrated by the following observations of Lord Eldon, in *Bootle* v. *Blundell* (*f*): "On a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that since it

(*c*) *Ancaster* v. *Mayer*, 1 Bro. C. C. 462.

(*d*) *Fereyes* v. *Robertson*, Bunb. 302; *Dolman* v. *Smith*, Prec. Chanc. 458.

(*e*) By Lord Eldon, in *Bootle* v. *Blundell*, 1 Meriv. 230; *Dawes* v. *Scott*, 5 Russ. 32.

(*f*) 1 Meriv. 219.

has been laid down that express words are not necessary to exempt the personal estate, there must be in the Will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention' and 'necessary implication,' to operate that exemption" (*g*).

In some of the earlier cases, evidence *dehors* the Will was received, to show the testator's intention: But on this point, Lord Eldon expressed his clear opinion, in *Bootle* v. *Blundell* (*h*), that with regard to circumstances *dehors* the Will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a Will, such question being fit to be decided only by an examination of the whole Will taken together (*i*).

The principle which has the greatest influence on the determination of this question, and which has been uniformly supported by all the cases, is, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts and legacies: The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged (*k*). In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate, that the question is to be decided (*l*).

Cases where no sufficient expression by

Thus it has been held, that a mere bequest of residuary personal estate by the term "residue" (*m*), or "*all* my personal

(*g*) See the observations made on this passage by Knight Bruce, V.-C., in *Collis* v. *Robins*, 1 De G. & Sm. 141, and by Lord Halsbury, L. C., in *Kilford* v. *Blaney*, 31 C. D. 56, 61. And see as to the meaning of "necessary implication," *per* Lord Eldon in *Wilkinson* v. *Adam*, 1 V. & B. 422, 466.

(*h*) 1 Meriv. 216.

(*i*) See also *Inchiquin* v. *French*, 1 Cox, 9; *Stephenson* v. *Heathcote*, 1 Eden, 39; *Andrews* v. *Emmot*, 2 Bro. C. C. 297; *Standen* v. *Standen*, 2 Ves. 589; *Coote* v. *Coote*, 3 J. & Lat. 175. And see *per* Rigby, L. J., in *Re Grainger*, [1900] 2 Ch. 756; and *per* Lord Davey in *S. C.*, *sub nom. Higgins* v. *Dawson*, [1902] A. C. at p. 9.

(*k*) *Bootle* v. *Blundell*, 1 Meriv. 220.

(*l*) *Ibid.* 230; *Bickham* v. *Cruttwell*, 3 My. & Cr. 763; *Collis* v. *Robins*, 1 De G. & Sm. 131, 141; *Trott* v. *Buchanan*, 28 C. D. 446, 453.

(*m*) *Samwell* v. *Wake*, 1 Bro. C. C.

testator of intention to exonerate personal estate.

estate" (*n*), or a like bequest, after previous sums or articles given out of it (*o*), or as of personal property "not otherwise disposed of" (*p*), is not singly sufficient to exempt the personal fund from its natural primary obligation to pay debts and legacies, although the real estate be also subjected to their payment by the Will. Again, charging the real estate ever so anxiously for the discharge of debts will not of itself exempt the personal (*q*): And whether the whole real estate be charged with debts and legacies (*r*), or a sufficient part of it (*s*), or a specific part of it (*t*), or it be given in trust to pay debts and legacies by sale of it (*u*), or a term of years be created out of it for those purposes (*x*), still the personal estate must be *first* applied. Again, neither a devise for payment of debts and legacies out of the rents of real estates (*y*), nor a devise on condition of the devisee paying the debts (*z*), nor a mere charge of funeral and testamentary expenses, as well as debts, on the land (*a*), nor an express charge of only *some* of the debts upon the *personalty* (*b*), will exempt the personal fund from its legal primary liability (*c*).

A very strong inference against the claim of exemption of the personal estate appears to be the circumstance of its falling to the executor for his benefit *virtute officii* (*d*), prior to the statute 1 Will. IV. c. 40 (*e*), or in an instance of the gift of the

144; *Tait* v. *Lord Northwick*, 4 Ves. 824.

(*n*) *Harewood* v. *Child*, cited Cas. temp. Talb. 204; *Haslewood* v. *Pope*, 3 P. Wms. 324; *Brummel* v. *Prothero*, 3 Ves. 111; *Aldridge* v. *Wallscourt*, 1 Ball & Beat. 312. But see *post*, p. 1334.

(*o*) *Brydges* v. *Phillips*, 6 Ves. 567.

(*p*) *Hartley* v. *Hurle*, 5 Ves. 540.

(*q*) By Lord Loughborough, in *Tait* v. *Lord Northwick*, 4 Ves. 824.

(*r*) *Dolman* v. *Smith*, Prec. Chanc. 456.

(*s*) *Inchiquin* v. *French*, Ambl. 33, 37; *S. C.*, 1 Cox, 1; *Rhodes* v. *Rudge*, 1 Sim. 79.

(*t*) *White* v. *White*, 2 Vern. 43; *Bridgman* v. *Dove*, 3 Atk. 201; *Fitzgerald* v. *Field*, 1 Russ. Chanc. Cas. 428.

(*u*) *Inchiquin* v. *French*, 1 Cox, 1; *Hancox* v. *Abbey*, 11 Ves. 186.

(*x*) *Tower* v. *Rous*, 18 Ves. 132.

(*y*) *Hartley* v. *Hurle*, 5 Ves. 540.

(*z*) *Bridgman* v. *Dove*, 3 Atk. 201.

(*a*) *Walker* v. *Jackson*, 2 Atk. 626; *Stephenson* v. *Heathcote*, 1 Eden, 38; *Brydges* v. *Phillips*, 6 Ves. 570. See also *Gray* v. *Minnethorpe*, 3 Ves. 103; *Hartley* v. *Hurle*, 5 Ves. 540; *M'Cleland* v. *Shaw*, 2 Scho. & Lef. 538; *Bootle* v. *Blundell*, 1 Meriv. 228, 229. But see *post*, p. 1333.

(*b*) *Watson* v. *Brickwood*, 9 Ves. 447.

(*c*) 1 Rop. Leg. 609, 3rd edit.

(*d*) *Gray* v. *Minnethorpe*, 3 Ves. 106; Coote, Mortg. 1028, 5th edit.

(*e*) See *ante*, p. 1218.

personal estate to the executor as a legacy, and the appointment of him to be executor, being in one and the same sentence (*f*): but the converse of the proposition above stated, *i.e.*, the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate. Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of a personal estate, as a specific legacy, exempt from the payment of debts (*g*).

Again, the circumstance of the *same persons* being appointed trustees and executors has had considerable weight in inducing Judges to draw an inference, that the personal estate is not to be exempted (*h*): and Lord Alvanley has remarked (*i*), that the circumstance of the trustees not being the executors affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate (*k*).

It has been already stated, that a *mere charge* of funeral expenses upon the real estate will not exempt the personal fund from its primary liability to debts, &c. However, such a charge, in concurrence *with other circumstances*, has, in some cases, had importance attached to it, in exempting the personal estate from debts, &c., upon the reasoning, that, as funeral expenses primarily attach themselves to the personal fund in the hands of executors, the testator, by transferring that duty from them to the trustees of the real estate, must have intended to give the whole of the personalty to the legatee, specifically discharged from every obligation to which it was naturally liable (*l*). On the other hand, in some instances, the omission to charge funeral expenses on the real estate has been considered a circumstance of some weight, to show that the personal estate is not to be exempt, because it shows that the testator intends the personal estate to be charged beyond the particular legacies or charges mentioned in the Will, and being once broken in upon, the argument of its being specific is destroyed (*m*).

(*f*) *Bromhall* v. *Wilbraham*, Cas. temp. Talb. 274; *Rhodes* v. *Rudge*, 1 Sim. 79; Coote, Mortg. 1028, 5th edit.

(*g*) *Hall* v. *Brooker*, Gilb. Eq. Rep. 73; Coote, Mortg. 1029, 5th edit.

(*h*) *Dolman* v. *Smith*, Prec. Chanc. 456; Coote, Mortg. 1027, 5th edit.

(*i*) *Burton* v. *Knowlton*, 3 Ves. 108.

(*k*) Coote, Mortg. 1027, 5th edit.

(*l*) *Burton* v. *Knowlton*, 3 Ves. 108. See also *Greene* v. *Greene*, 4 Madd. 157; *Michell* v. *Michell*, 5 Madd. 69.

(*m*) *Brydges* v. *Phillips*, 6 Ves. 570; Coote, Mortg. 1028, 5th edit.

Again there has been occasion to state that the personalty is not exempted by the fact of the debts, &c., being charged upon the real estate, and a mere concomitant bequest of *all* the personal estate (*n*). However, in several instances, the circumstance of such a bequest, as distinguished from a gift of the *residue*, has been treated as having weight (*o*).

The limits of this Treatise will not allow that the different instances, in which the intention of the testator in favour of the exemption of the personal estate has been established, should be stated at large. The principal decisions of that nature will be found collected in the note below (*p*), and the attention of the reader is particularly directed to the case of *Bootle* v. *Blundell* (*q*), in which almost every circumstance occurred which had been the subject of judicial observations in preceding cases, and upon

(*n*) *Ante*, p. 1332.

(*o*) *Tower* v. *Rous*, 18 Ves. 139; *Bootle* v. *Blundell*, 1 Meriv. 228; *Greene* v. *Greene*, 4 Madd. 148; *Michell* v. *Michell*, 5 Madd. 69; *Gilbertson* v. *Gilbertson*, 34 Beav. 354; *Trott* v. *Buchanan*, 28 C. D. 446.

(*p*) *Waise* v. *Whitfield*, 8 Vin. Abr. 437, tit. Devise (Z. d.), pl. 19; *Adams* v. *Meyrick*, 1 Eq. Cas. Abr. 271, pl. 13; *March* v. *Fowke*, Finch, Rep. 414; *Wainwright* v. *Bendlowes*, 2 Vern. 718; *S. C.*, Prec. Chanc, 451; *Anderton* v. *Cooke*, cited 1 Bro. Ch. Cas. 457; *Bamfield* v. *Wyndham*, Prec. Chanc. 101; *Kynaston* v. *Kynaston*, 1 Bro. Ch. Cas. 457, *in notis*; *Holiday* v. *Bowman*, cited 1 Bro. Ch. Cas. 145; *Gaskill* v. *Hough*, cited 31 Ves. 110; *Att.-Gen.* v. *Barkham*, cited Cas. temp. Talb. 206; *Stapleton* v. *Colvile*, Cas. temp. Talb. 202; *Phipps* v. *Annesley*, 2 Atk. 57; *Bicknel* v. *Page*, 2 Atk. 79; *Walker* v. *Jackson*, 2 Atk. 624; *S. C.*, 1 Wils. 24; *Williams* v. *Bishop of Llandaff*, 1 Cox, 254; *Webb* v. *Jones*, 1 Cox, 245; *S. C.*, 2 Bro. Ch. Cas. 60; *Burton* v. *Knowlton*, 3 Ves. 107; *Hancox* v. *Abbey*, 11 Ves. 179; *Bootle* v. *Blundell*, 1 Meriv. 193; *Gittins* v. *Steele*, 1 Swanst. 24; *Greene* v. *Greene*, 4 Madd. 148; *Michell* v. *Michell*, 5 Madd. 69; *Noel* v. *Noel*, 12 Price, 213; *Welby* v. *Rockcliffe*, 1 Russ. & M. 571; *Driver* v. *Ferrand*, *ibid.* 681; *Clutterbuck* v. *Clutterbuck*, 1 M. & K. 15; *Blount* v. *Hipkins*, 7 Sim. 43; *Vandeleur* v. *Vandeleur*, 9 Bligh, 157; *Jones* v. *Bruce*, 11 Sim. 221; *Ashby* v. *Ashby*, 1 Coll. 549; *Bateman* v. *Roden*, 1 J. & Lat. 356; *Lamphier* v. *Despard*, 2 Dr. & Warr. 59; *Coote* v. *Coote*, 3 J. & Lat. 175; *Collis* v. *Robins*, 1 De G. & Sm. 131; *Ouseley* v. *Anstruther*, 10 Beav. 453; *Lomax* v. *Lomax*, 12 Beav. 285; *Quennell* v. *Turner*, 13 Beav. 240; *Woodhead* v. *Turner*, 4 De G. & Sm. 429; *Evans* v. *Evans*, 17 Sim. 102; *Whieldon* v. *Spode*, 15 Beav. 537; *Plenty* v. *West*, 16 Beav. 173; *Forrest* v. *Prescott*, L. R. 10 Eq. 545. And see the cases stated 1 Rop. Leg. 610 *et seq.*, 3rd edit.; 2 Pow. Dev. 681 *et seq.*, Jarman's edit.; Coote, Mortg. 1025 *et seq.*, 5th edit.; 2 Jarm. Wills, 5th edit., 1461 *et seq.*

(*q*) 1 Meriv. 193.

which different Judges had formed different opinions as to their effect singly to exonerate the personal estate: and Lord Eldon, after going through a review of those cases, and making full observations upon every part of the Will, determined that the personal estate was exonerated from the primary liability to pay debts.

Where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails.

It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees, and therefore if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration (*r*). In other words, where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails. And this principle applies *whether the property dealt with be realty or personalty* (*s*).

Legacies given out of a particular fund:

It is necessary, before leaving this subject, to advert to a distinction which exists with respect to it, between debts and legacies. It has already appeared, that a pecuniary legacy, given generally, without specification of a particular fund for its payment, is primarily chargeable upon the personal estate, although in other parts of the Will, the real estate is made expressly liable to it; the rule of law considering the personal estate as the natural fund to bear such a charge (*t*): But if the pecuniary legacy be not given generally, but only out of a particular fund, there the legatee can have recourse only to the particular fund (*u*): and in this, there is an essential difference between debts and legacies (*x*).

(*r*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182.

(*s*) *Kilford* v. *Blaney*, 31 C. D. 55, 56. See also *Fisher* v. *Fisher*, 2 Keen. 610.

(*t*) *Ante*, pp. 1329, 1331.

(*u*) *Kirke* v. *Kirke*, 4 Russ. Chanc. Cas. 435, 449. See *Spurway* v. *Glynn*, 9 Ves. 483; *Hancox* v. *Abbey*, 11 Ves. 179; *Gittins* v. *Steele*, 1 Swanst. 24; *Rickets* v. *Ladley*, 3 Russ. Chanc. Cas. 418; *Roberts* v. *Roberts*, 13 Sim. 336; *Dickin* v. *Edwards*, 4 Hare, 273, 276; *Fream* v. *Dowling*, 20 Beav. 624; *Ion* v. *Ashton*, 28 Beav. 379; *Sinnett* v. *Herbert*, L. R. 12 Eq. 201. But see also *Mann* v. *Copeland*, and the other cases cited, *ante*, p. 923. See further *Colvile* v. *Middleton*, 3 Beav. 570.

(*x*) *Kirke* v. *Kirke*, 4 Russ. Chanc.

exoneration of the general personal estate.

Further, it may be stated as a rule that where a testator gives a certain portion of his personal estate and expressly directs that it shall be liable and applicable to the payment of his debts, it is an exoneration of the general personal estate (*y*).

Mixed fund of real and personal estate in one mass directed to be applied to payment of debts and legacies:

Where the testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies (*z*): But this rule is not applicable where the real and personal estate are not thrown into one mass, notwithstanding they are both given to the same persons, in trust therewith to pay debts and legacies; for in such case each fund retains its original character and its original liabilities (*a*). In order that the rule should apply it is not necessary that the testator should have directed an absolute conversion of the real estate; it is sufficient that he has shown an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid (*b*). The fact, however, that a mixed fund of personalty and proceeds of sale of realty is created will not exonerate the personalty from its primary liability in the absence of a direction to pay the debts and legacies out of the mixed fund (*c*).

Specific bequests not affected by a general

It may here be mentioned that where there is a specific devise or a specific legacy, the presumption is that the testator intended that the devisee or legatee should have it in its integrity:

Cas. 449. See *Noel* v. *Lord Henley*, 7 Price, 241; *S. C.* in Dom. Proc. 12 Price, 213, *nomine Noel* v. *Noel*.

(*y*) *Webb* v. *De Beauvoisin*, 31 Beav. 576; *Vernon* v. *Manvers*, 31 Beav. 623; *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; *Trott* v. *Buchanan*, 28 C. D. 446.

(*z*) *Roberts* v. *Walker*, 1 Russ. & M. 572; *Dunk* v. *Fenner*, 2 Russ. & M. 557; *Fourdrin* v. *Gowdey*, 3 M. & K. 383; *Stocker* v. *Harbin*, 3 Beav. 479; *Salt* v. *Chattaway*, 3 Beav. 576; *West* v. *Cole*, 4 Y. & Coll. 460; *Young* v. *Hassard*, 1 Jones & Lat. 466; *Barry* v. *Harding*, *ibid.* 475; *Att.-Gen.* v. *Southgate*, 12 Sim. 77; *Shallcross* v. *Wright*, 12 Beav. 505; *Robinson* v. *Governors of London Hospital*, 10 Hare, 19. See also *Falkner* v. *Grace*, 9 Hare, 282; *Lord* v. *Wightwick*, 1 Drewr. 576; *Tatlock* v. *Jenkins*, Kay, 654; *Bentley* v. *Oldfield*, 19 Beav. 225, 228; *Simmons* v. *Rose*, 21 Beav. 37; 6 De G. M. & G. 411; *Allan* v. *Gott*, L. R. 7 Ch. 439.

(*a*) *Boughton* v. *Boughton*, 1 H. L. C. 406; *Blann* v. *Bell*, 5 De G. & Sm. 658; *Tidd* v. *Lister*, 3 De G. M. & G. 857; *Tench* v. *Cheese*, 6 De G. M. & G. 453.

(*b*) *Allan* v. *Gott*, L. R. 7 Ch. 439.

(*c*) *Elliott* v. *Dearsley*, 16 C. D. 322; *Re Boards*, [1895] 1 Ch. 499.

Therefore a general charge of particular legacies on the whole real and personal estate will not be allowed to operate as a charge in derogation of such specific devise or legacy (*d*).

charge of legacies on real and personal estate.

The expression in a Will "all my just debts" includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the Will, and contracted in a country other than that of his domicil, and secured upon property in that country (*e*).

"All my just debts," meaning of.

SECTION II.

Of Marshalling the Assets in favour of Creditors and Legatees.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person, having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (*f*). This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund: And accordingly, a Court of Equity will, if necessary, control that election, and compel the one to resort to that fund, which the other cannot reach (*g*). But the more general practice is, to protect the claimant on the single fund by marshalling the assets.

Thus if the deceased died before the passing of the stat. 3 & 4 Will. IV. c. 104 (*h*), *i.e.*, before the 29th of August,

In favour of creditors.

(*d*) *Spong* v. *Spong*, 1 Dow. & C. 365; *ante*, p. 924, note (*y*). *Conron* v. *Conron*, 7 H. L. C. 168. See also *Mannox* v. *Greener*, L. R. 14 Eq. 456. "But, after all, it is a question of intention, and if there is something more or something other than the mere fact of a charge upon all his lands, then we have to consider from the whole Will what is the intention which we are to attribute to the testator": *per* Lord Herschell in *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181, 185.

(*e*) *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506.

(*f*) *Aldrich* v. *Cooper*, 8 Ves. 388; *Tidd* v. *Lister*, 3 De G. M. & G. 857, 872; *Haynes* v. *Forshaw*, 11 Hare, 93; *Legh* v. *Legh*, 15 Sim. 135; *Finch* v. *Shaw*, 19 Beav. 500; *Gibson* v. *Seagrim*, 20 Beav. 614; *South* v. *Bloxham*, 2 Hemm. & M. 457.

(*g*) See Fonbl. Treat. Eq. B. 3, c. 2, s. 6, note (*i*).

(*h*) See *ante*, p. 1313.

1833, and there were creditors of the deceased by specialty, and creditors by simple contract, and the specialty creditors, instead of resorting to the real assets, which they alone could reach, proceeded against the personal estate, to the exclusion of the simple contract creditors, who had no other fund, a Court of Equity would marshal the assets by permitting the simple contract creditors to stand in the place of the specialty creditors against the real assets, so far as the latter should have exhausted the personal (*i*): And the rule was the same with respect to real assets devised, as those descended (*k*).

So in the case of *Aldrich* v. *Cooper* (*l*), the testator died seised of freehold and copyhold estate, both of which were subject to mortgage: The personal estate was exhausted in payment of the mortgage and of two bonds upon which the testator was indebted to the mortgagee: And Lord Eldon held, that the simple contract creditors were entitled to stand in the place of the mortgagee *pro tanto*, against both the freehold and copyhold estate. So in another case (*m*), the specialty creditors of a deceased mortgagor of copyhold and freehold estate were allowed to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate (*n*).

(*i*) But they shall not stand in the place of the specialty creditors as to the interest which would have accrued on the specialty debts if they had remained unsatisfied: *Cradock* v. *Piper*, 15 Sim. 301.

(*k*) *Selby* v. *Selby*, 4 Russ. Ch. C. 341. So covenantees, who claim under a merely voluntary covenant, have been held entitled, as against devisees, to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts; *Lomas* v. *Wright*, 2 M. & K. 769; *Hales* v. *Cox*, 32 Beav. 118. But the assets will not be marshalled against judgment creditors: *Sharpe* v. *Lord Scarborough*, 4 Ves. 538. Now, however, it would seem that the Courts would not give any priority to a judgment creditor until he has obtained a charge by getting the land delivered in execution, and by registering the writ or order affecting the land in pursuance of the Land Charges Registration and Searches Act, 1888.

(*l*) 8 Ves. 381, overruling *Robinson* v. *Tonge*, 1 P. Wms. 679, note.

(*m*) *Gwynne* v. *Edwards*, 2 Russ. Ch. C. 289, *in notis*.

(*n*) The specialty creditors could not otherwise have reached the copyhold; for copyhold estates previous to the passing of the stat. 3 & 4 Will. IV. c. 104 (see *ante*, p. 1313), were not liable either at law or equity to the testator's debts, further than he had subjected them thereto.

Again, if the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate (*o*).

Formerly there was a doubt (*p*) as to how far this principle of equity could be applied to prevent a secured creditor from proving under a decree in a creditor's suit for the full amount of his debt, but now this question cannot arise, since by the Judicature Act, 1875, s. 10, the rules of bankruptcy on this point are imported into the administration by the Court of insolvent estates (*q*).

In favour of legatee.

A similar equity will be extended in favour of legatees: Thus where a specialty creditor, who has a general lien on the real estate, as a creditor by bond in which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have *descended* to the heir (*r*). "In the case of legatees," said Lord Eldon, in *Aldrich* v. *Cooper* (*s*), "against assets descended, a legatee has not so strong a claim to this species of equity as a creditor: but the mere bounty of the testator enables the legatees to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not."

(*o*) *Selby* v. *Selby*, 4 Russ. Ch. C. 336.

(*p*) *Greenwood* v. *Taylor*, 1 Russ. & M. 185; *Mason* v. *Bogg*, 2 M. & Cr. 443.

(*q*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), 2nd Sched. rules 9—11, and *ante*, p. 759.

(*r*) *Bowaman* v. *Reeve*, Prec. Chanc. 578; *Lutkins* v. *Leigh*, Cas. temp. Talb. 54; *Hanby* v. *Roberts*, Ambl. 128; cf. *Re Smith* [1899], 1 Ch. 365, disapproving *Smith* v. *Smith*, 10 Ir. Ch. Rep. 89, 461. Therefore where the executor of a testator is a mortgagee of the real estate, as to which there was an intestacy, and also a legatee under his Will, he is not bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands, the reason being, that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied: *Binns* v. *Nicholls*, L. R. 2 Eq. 256.

(*s*) 8 Ves. 396.

And on the same principle it seems to be clear, that if, since the passing of the stat. 3 & 4 Will. IV. c. 104 (*t*), by which the real estate is made liable to simple contract debts, a simple contract creditor should receive satisfaction out of the personal estate and thereby exhaust it, the legatees would be allowed to stand in his place against the real assets which have descended.

But where the real estate does not descend to the heir, but is *devised* to a stranger, or to the heir taking as devisee (*u*), the assets are not marshalled in favour of general legatees, so as to throw the creditors on the real assets *devised* (*x*). And this rule is not confined to specific devises of land, but extends to lands which pass under a residuary devise (*y*). If, indeed, the lands

(*t*) *Ante*, p. 1313.

(*u*) See the MS. note of Serjeant Hill, in Blunt's edition of Ambler, p. 383, on the question whether a devise of land to the heir, which is void as to passing the estate, shall not exempt the lands from the legatees' right to stand in the place of specialty creditors. It has been held by Sir L. Shadwell, V.-C., that since the stat. 3 & 4 Will. IV. c. 106 (Act for the Amendment of the Law of Inheritance), wherever there is a devise to the heir, he must be considered to all intents and purposes as taking by devise and not by descent; for the third section of that statute (whereby it is provided that when any land shall have been devised by any testator who shall die after December 31st, 1833, to his heir, such heir shall be considered to have acquired the land as devisee and not by descent) is not to be considered as relating exclusively to the law of inheritance, but has also application with regard to assets: *Strickland* v. *Strickland*, 10 Sim. 374. And even in cases where the testator died before December 31st, 1833, so as not to be within the operation of this Act, the estates devised to the heir are not in equity to be applied to the payment of the testator's debts in priority to other parts of his estate devised to other persons: *Biederman* v. *Seymour*, 3 Beav. 368. As to having the personal estate applied in exoneration of the real, see *ante*, p. 1315 *et seq.*

(*x*) *Clifton* v. *Burt*, 1 P. Wms. 678; *Scott* v. *Scott*, Ambl. 383; *Hanby* v. *Fisher*, Ambl. 128; *Keeling* v. *Brown*, 5 Ves. 359; *Aldrich* v. *Cooper*, 8 Ves. 397.

(*y*) *Mirehouse* v. *Scaife*, 2 M. & Cr. 695. But it must be remembered that, notwithstanding sect. 24 of the Wills Act, a residuary devise is still specific, and therefore a general pecuniary legatee has no right to have the assets marshalled as against the residuary devisee: *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; the effect of which would be to throw the whole deficiency of the pecuniary legacy on the devised estate. It will be seen, however, that Lord Chelmsford, in *Hensman* v. *Fryer*, whilst deciding that the pecuniary legatee had no right, by marshalling in the sense above mentioned, to throw upon

devised are *charged with debts*, the assets will be marshalled; for lands so charged are applicable to the payment of debts before general pecuniary legacies (*z*).

With respect to specific legatees, the assets shall be so far marshalled against the specific devisees of real estate, upon failure of the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, *contribute* to the payment of the specialty debt (*a*).

Before the passing of Locke King's Act and the Acts amending it, much discussion occurred as to the rights of general legatees in cases, where a creditor having a specific lien on the real estate resorted to the personalty, to have the assets marshalled against real assets, and also as to the law in the case of a vendor having an equitable lien for unpaid purchase-money.

the devisee the whole deficiency, yet decided that the residuary real estate devised and the pecuniary legacies were respectively liable to contribute to the debts of the testator, which his general personal estate was insufficient to satisfy, *pro ratâ*. But this decision is contrary to the settled rule that personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to, and accordingly has not been followed: *Collins* v. *Lewis*, L. R. 8 Eq. 708; *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234; *Tomkins* v. *Colthurst*, 1 C. D. 626; *Farquharson* v. *Floyer*, 3 C. D. 109.

(*z*) *Foster* v. *Cook*, 3 Bro. C. C. 347; *Paterson* v. *Scott*, 1 De G. M. & G. 531; *Surtees* v. *Parkin*, 19 Beav. 406; *Re Stokes* (1892), 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834. The law on this subject is not affected by the stat. 3 & 4 Will. IV. c. 104: *Rickard* v. *Barrett*, 3 Kay & J. 289; *Re Grainger*, *Dawson* v. *Higgins*, [1900] 2 Ch. 756. But general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land devised: *Ante*, p. 1318, note (*k*).

(*a*) *Ante*, p. 1318; *Long* v. *Short*, 1 P. Wms. 403; *Tombs* v. *Roch*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 654. But a testator may by the terms of his Will exclude this rule if his intention be clear. Thus in *Bateman* v. *Hotchkin*, 10 Beav. 426, where a testator directed all his debts in the first place to be paid out of his personal estate, except his leaseholds, if sufficient, and if not he charged his real estate therewith, it was held by Lord Langdale that the specific legacies were liable to the payment of the debts in priority to the real estate. And in *Raikes* v. *Boneton*, 29 Beav. 41, Romilly, M. R., held that as between a portion charged on real estate and the person to whom the real estate was devised subject to the portion, the latter alone was liable to make good the deficiency of the testator's general personal estate. See also *Re Saunders-Davies*, 34 C. D. 482; and *Re Bawden*, [1894] 1 Ch. 693.

The general result of the authorities was in favour of the right of pecuniary legatees; but it is apprehended that no such discussion can arise hereafter in cases falling within the operation of the above Acts, since by them the real estate subject to the lien is made the primary fund for the payment of the debts secured by the lien; and the right of the pecuniary legatee, as well as that of residuary legatees and the next of kin, to marshal, can no longer be questioned (*b*). In *Re Smith* (*c*), the testator had under the doctrine of *Greville* v. *Browne* (*d*) charged pecuniary legacies on his residuary estate, and also directed certain mortgage debts on specifically devised real estate to be paid out of the residuary estate, and the Court had to consider what was the right of a devisee of real estate charged with a mortgage debt of the testator to have that debt paid out of residue as against the pecuniary legatees, and the learned judge said: "After *Lutkins* v. *Leigh* (*e*), and before Locke King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the Will entitled, as against a residuary legatee, to have the mortgage debt paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty." . . . . "The effect of the Real Estate Charges Act, 1854, commonly known as Locke King's Act, was to benefit the pecuniary legatee, and not to prejudice any rights he previously had in equity. So that if a testator by his Will negatived the application of the Act, without directing that the rule should not apply, then of course the rule had to be applied." An order was accordingly made giving priority to the pecuniary legacies over the mortgage debts.

Another instance of marshalling the assets in favour of legatees occurs where one or more legacies are charged on the real estate, and there is another legacy which is not so

(*b*) For the cases in which these questions were discussed, see the earlier Editions of this Work.

(*c*) [1899] 1 Ch. 365.

(*d*) 7 H. L. C. 689; *Greville* v. *Browne* finally decided that where legacies are given generally, and there is a gift of the residue of the real and personal estate, the legacies are charged upon the entire residue.

(*e*) Cas. t. Tal. 53; *ante*, p. 1317.

charged. There the legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real assets (*ee*).

It is clearly established that the Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal assets, when it would be void by touching an interest in land (*f*).

Order in which assets are applied in payment of debts.

It seems convenient in reference to marshalling to set forth the order in which, in the absence of a contrary intention sufficiently expressed, assets are applied in the payment of debts:

(1.) The general or residuary personalty, not specifically bequeathed or exonerated or exempted (*g*).

(*ee*) *Bligh* v. *Lord Darnley*, 2 P. Wms. 620; *Bonner* v. *Bonner*, 13 Ves. 379; 2 M. & Cr. 700. There is no distinction between the case of a class of legacies and a case of individual legacies; for the Court presumes that the testator's intention in charging the land is that all the legacies shall be paid in full: *Scales* v. *Collins*, 9 Hare, 656.

(*f*) *Robinson* v. *Geldard*, 3 Mac. & G. 735, 744, by Lord Truro. But where the testator (so to speak) marshals his own assets by directing that a charitable legacy shall be paid out of pure personalty, the result of such a direction is that such legacy is payable in full out of pure personalty, in priority to other legacies: *Robinson* v. *Geldard*, 3 Mac. & G. 735. In this case Lord Truro said that he considered the charitable legacies so directed to be paid as being analogous to, if not strictly identical with, demonstrative legacies. This direction, however, does not exempt the charitable legacy from bearing its proportion of debts, funeral and testamentary expenses, as it would do if it made the legacy strictly *demonstrative: Tempest* v. *Tempest*, 7 De G. M. & G. 470; *Beaumont* v. *Oliveira*, L. R. 4 Ch. 309, affirming the decision of Stuart, V.-C., L. R. 6 Eq. 534. See also *Re Somers-Cocks*, [1895] 2 Ch. 449. But it should be noted that in the case of testators dying after August 5th, 1891, attempts to marshal for the benefit of a charity are rendered unnecessary, for by sect. 3 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), impure personalty has been exempted from the provisions of the Mortmain and Charitable Uses Act, 1888 (the statute now in force): and by sect. 3 land may be assured by Will for any charitable use, but must be, except as otherwise provided by the Act, sold within a year of the testator's death. Leaseholds apparently fall within the definition of land in sect. 3. See *Re Kershaw*, 37 C. D. 674, where the similar words "any land or other hereditaments of whatever tenure," in 40 & 41 Vict. c. 34, were construed to include leaseholds.

(*g*) *Manning* v. *Spooner*, 3 Ves. 117; *Harmood* v. *Oglander*, 8 Ves. 124. As to the primary liability of mortgaged or charged lands to bear their own charges by Locke King's Acts, see *ante*, p. 1324 *et seq.*

(2.) Real estates appropriated to, and not merely charged with, the payment of debts (*h*).

(3.) Real estates descended, whether acquired before or after the making of the Will (*i*).

(4.) Real estates devised, charged with the payment of debts (*k*).

(5.) General pecuniary legacies *pro ratâ* (*l*).

As to the exoneration of personal estate as against the heirs or devisees of real estate, see *ante*, p. 1329 *et seq.* The principle was laid down in *Fisher* v. *Fisher*, 2 Keen, 610, and followed by *Wood* v. *Ordish*, 3 Sm. & G. 125, that as between the heir-at-law, the next of kin, and the residuary devisees and legatees, a lapsed share of real and personal estate ought to be applied in the same order as if the legatee had survived: *Ryves* v. *Ryves*, L. R. 11 Eq. 539. See also *Stead* v. *Hardaker*, L. R. 15 Eq. 175; *Blann* v. *Bell*, 7 C. D. 382. In *Gowan* v. *Broughton*, L. R. 19 Eq. 77, Malins, V.-C., seems to have considered that a lapsed share of residuary personal estate should exonerate the other shares and be the primary fund for the payment of the costs of an administration suit; but the Vice-Chancellor in *Re Jones*, 10 C. D. 40, said that all he intended to decide in *Gowan* v. *Broughton* was that where the residuary personalty is given to a person who dies in the life of the testator such personalty is no less the primary fund than it would have been if the legatee had survived. And the cases of *Trethewy* v. *Helyar*, 4 C. D. 53, and *Fenton* v. *Wills*, 7 C. D. 33, are direct authorities that what Malins, V.-C., appeared to decide in *Gowan* v. *Broughton* cannot be supported.

(*h*) *Manning* v. *Spooner*, 3 Ves. 117; *Harmood* v. *Oglander*, 8 Ves. 124; *Phillips* v. *Parry*, 22 Beav. 279.

(*i*) *Wride* v. *Clarke*, 2 Bro. C. C. 261, note; *Harmood* v. *Oglander*, *ubi supra*; *Row* v. *Row*, L. R. 7 Eq. 414. See as to real estate descended, not as undisposed of, but through forfeiture by the devisee under a Will, note (*m*), *infra*. Freeholds escheating to the lord are assets for payment of debts, but whether in priority to or *pari passu* with lands specifically devised is doubtful: *Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Ha. 749; cf. also *Prescott* v. *Tyler*, 1 Jur. 470; *Magit* v. *Johnson*, 2 Doug. 542.

(*k*) *Harmood* v. *Oglander*, *ubi supra*; *Davis* v. *Topp*, 1 Bro. C. C. 524. A lapsed share so charged is applied in the same order: *Ryves* v. *Ryves*, L. R. 11 Eq. 539.

(*l*) *Clifton* v. *Burt*, 1 P. W. 680; Lord Chelmsford, in *Hensman* v. *Fryer*, L. R. 3 Ch. 420, decided that pecuniary legatees and residuary devisees must contribute *pro ratâ*; but this decision has not been followed. See *ante*, p. 1340 (*y*). Kay, J., in *Re Bate*, 43 C. D. 600, seems to have held that the classification of general pecuniary legacies after real property devised charged with debts is wrong, but this case has not been followed: *Re Stokes*, 67 L. T. N. S. 223; *Re Butler*, [1894] 3 Ch. 250; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834.

(6.) Specific and residuary devises and specific legacies *pro ratâ* (*m*).

(7.) Real and personal property which the testator has power to appoint, and which he has appointed, by his Will (*n*).

(8.) The wife's paraphernalia are assets for her deceased husband's debts (*o*).

(*m*) *Manning* v. *Spooner*, *ubi supra*; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; *Farquharson* v. *Floyer*, 3 C. D. 109; *Tombs* v. *Roch*, 2 Coll. 490; *Jackson* v. *Pease*, L. R. 19 Eq. 96. Demonstrative legacies are specific only so far as the funds appropriated to them by the testator are sufficient to meet them: *Sellon* v. *Watts*, 9 W. R. 847. Real estate which had descended to a testator's heir-at-law, not because it was not originally disposed of by the Will, but by reason of a subsequent forfeiture by the devisee under the provisions of the Will, was held not liable to pay the costs of an action to administer the testator's estate in priority to specifically devised and bequeathed freehold and leasehold estates: *Hurst* v. *Hurst*, 28 C. D. 159 (*post*, p. 1679). It is the settled practice of the Chancery Division that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that estate: *Re Middleton*, 19 C. D. 552; and this practice has not been altered or affected by the Land Transfer Act of 1897: *Re Jones*, [1902] 1 Ch. 92. As between real estate devised charged with portions and specifically bequeathed personalty the real estate must contribute in proportion to its full value and not in proportion to its value less the amount of the portions: *Re Saunders-Davies*, 34 C. D. 482.

(*n*) *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Holmes* v. *Coghill*, 7 Ves. 499; 12 Ves. 206. As to property over which married women have a testamentary power, see *ante*, p. 1302 (*o*). And as to whether personal property appointed under a general power becomes legal or equitable assets, see *ante*, p. 1306.

(*o*) *Parker* v. *Harvey*, 4 Bro. P. C. 609; *Ridout* v. *Earl Plymouth*, 2 Atk. 104.

BOOK THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF THE ACTS OF THE DECEASED; AND OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF HIS OWN ACTS.

CHAPTER THE FIRST.

OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT OF THE ACTS OF THE DECEASED.

SECTION I.

The general question as to what Claims upon the Deceased survive against the Executor or Administrator.

In matters of contract:

THE general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty*, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or adminstrator (*a*). Therefore, it is clear that the

(*a*) Touchst. 482; 1 Saund. 216 (*a*), note (1) to *Wheatley* v. *Lane*. It was said by Willes, C. J., in *Sollers* v. *Lawrence*, Willes, 421, that "actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years." And therefore, notwithstanding the rule *actio personalis moritur cum personâ*, if an injury has been done to personal property of the plaintiff for relief arising out of which *assumpsit* could have been brought as in the case of actions against carriers and bailees, the executors of the deceased may be sued; that is to say, the executor may be sued on the obligation implied by law on which *assumpsit* would have lain against his testator: *Phillips* v. *Homfray*, 24 C. D. 439; *Batthyany* v. *Walford*, 36 C. D. 269; *Peebles* v. *The Oswald-*

executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances: or debts due on special contract, as for rent, or on bonds, covenants, and the like, under seal; or debts on simple contract, as notes unsealed, and promises not in writing, either expressed or implied (*b*). So an executor may be sued by the lord of a manor for a relief due from the testator (*c*).

In the case of *Eton College* v. *Beauchamp* (*d*), there was a rent issuing out of lands, and the tertenant died, leaving arrears due to Eton College: And it was decreed that though the person of the tertenant was not chargeable with the rent at law, but only the land by way of distress, yet his executor should pay the arrears as far as he had assets. So it is said, that where a man binds himself and his heirs, and leaves real assets, the heir, taking the profit, becomes so far a debtor, that his executor shall be charged (*e*).

In the case of *Wilson* v. *Tucker* (*f*), an action was sustained against the executor of an attorney for negligence by the deceased, in transacting the business of the plaintiff. Such claim may be regarded as arising *ex contractu*, and as founded on an implied promise to exercise reasonable care and skill in the performance of his duty as solicitor of the plaintiff (*g*).

And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain,

twistle Urban District Council, [1896] 2 Q. B. 159 (where the alleged cause of action arose out of a statutory duty); *Blackmore* v. *White*, [1899] 1 Q. B. 293 (where the cause of action arose from a breach of an implied contract to discharge the customary obligation to repair a tenement according to the custom of the manor). And see further, as to the rule *actio personalis moritur cum personâ*, *ante*, p. 606 *et seq.*, and *post*, p. 1352.

(*b*) Bac. Abr. Exors. (P.) 1 Com. Dig. Admon. (B. 14).

(*c*) *St. John* v. *Bawdripp*, Noy, 43; Com. Dig. Admon. (B. 14).

(*d*) 1 Chanc. Cas. 121.

(*e*) Wentw. Off. Ex. 249, 256, 14th edit.; *Henningham's Case*, Dyer, 344, *b*. As to the power of an executor or administrator, liable as such, to the rent, covenants, or agreements contained in any conveyance on chief rent, or rent-charge granted or assigned to or made and entered into with the testator or intestate, to escape future liability thereunder, see the provisions of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 28; *ante*, p. 1081.

(*f*) 3 Stark. N. P. C. 154. See also *Dutton* v. *Tayley*, 18 Hill, MS. 285.

(*g*) *Blyth* v. *Fladgate*, [1891] 1 Ch. at p. 366 (*per* Stirling, J.).

and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, &c.: For, wherever in those cases the testator himself is liable to an action, his executors shall be liable also (*h*).

It must be observed, however, that certain *forms* of action do not, at the common law, survive against the executor or administrator, as will hereafter be shown in the investigation of the subject of remedies generally (*i*): But other actions were substituted in their room upon the very same cause which do survive and lie against the executor or administrator (*k*).

The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it (*l*): for the executors or administrators of every person are implied in himself (*m*).

In *Harwood* v. *Hilliard* (*n*), a sale was to be made of a parcel of land, and it was agreed, between the plaintiffs and the defendant's testator, that if it should not produce a certain sum, then they should repay each other proportionably to the abatement; and the defendant's testator covenanted for himself and his executors, to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale, by the space of ten days; but it was not said, that such notice was to be given to his executors or administrators: And the whole Court agreed, that, as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor and not to the testator.

It is clear, also, that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein: Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator (*o*). So where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was held, that if A. departed

(*h*) Bac. Abr. Exors. (P.) 2.

(*i*) *Post*, Pt. v. Bk. II. Ch. I. p. 1828 *et seq.*

(*k*) *Hambly* v. *Trott*, Cowp. 375, by Lord Mansfield.

(*l*) Wentw. Off. Ex. c. 11, pp. 239, 243, 14th edit.; *Bradbury* v. *Morgan*, 1 H. & C. 249, 255.

(*m*) By Lord Macclesfield in *Hyde* v. *Skinner*, 2 P. Wms. 197.

(*n*) 2 Mod. 268.

(*o*) Toller, 463.

within the term, a writ of covenant lay against the executor of the covenantor, without naming him (*p*). So if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract (*q*). And in cases of this kind the executors will be liable even where the heir is named, and the executors are not named, in the contract (*r*).

Hence it appears that executors or administrators more actually represent their testator or intestate, than the heir does the ancestor: for if a man binds himself, his executors or administrators are bound, though not named; but it is not so of the heir by the common law, however large an amount of real assets may have descended to him (*s*): but by 3 & 4 Will. IV. c. 104, real estate of a deceased owner is chargeable with all liabilities which may arise out of obligations entered into by him during his life (*t*). And now sect. 59 of the Conveyancing and Law of Property Act, 1881, provides that "A covenant and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs and real estate, shall operate in law to bind the heirs and real estate as well as the executors and administrators and personal estate of the person making the same, as if the heirs were expressed."

If contract is personal to testator, no liability of executor.

The proposition, however, that executors or administrators are liable upon every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is *personal* to the testator or intestate: for in such instances no liability attaches upon the executors or adminis-

(*p*) Bro. Covenant, 12 Bac. Abr. Exors. (P.) 1.

(*q*) *Quick* v. *Ludborrow*, 3 Bulstr. 30, by Coke, C. J. In the case of *Gordon* v. *Calvert*, 2 Sim. 253; 4 Russ. Chanc. Cas. 581, A., on taking B. as a clerk, took a bond, from him and a surety, to secure his duly accounting for his receipts: No time was fixed for the continuance of the service, but it was to be determinable at the option of either party: The surety died: His executrix gave notice to A. that she should no longer consider herself liable on the bond: A. read the notice to B., and required him to execute a new bond, with another surety, which was done: Then B. died, and deficiencies were found in his accounts, subsequent to the notice: And it was held that the executrix of the surety had no equity to support an injunction to restrain an action on the bond.

(*r*) *Williams* v. *Burrell*, 1 C. B. 402.

(*s*) Co. Lit. 209, *a*; Wentw. Off. Ex. c. 11, 239, 240, 14th edit.

(*t*) *Hamer's Devisees' Case*, 2 De G. M. & G. 366; *ante*, p. 1314, note (*s*).

trators, unless a breach was incurred in the lifetime of the deceased (*u*). Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed (*x*). So a covenant by a master for the instruction of his apprentice is personal to the master, and his executors are not liable upon it (*y*).

On a covenant that in consideration of a weekly payment to A. and his executors for a term certain A. shall not exercise a particular trade, the executors of A. are not bound to abstain from exercising it after his death (*z*).

So it has been said, that if a lessee for years covenanted for himself to repair the houses demised, omitting other words, he is bound to repair only during his life, and the executors or administrators are not bound (*a*). And it has also been said, that if a lessor covenants for himself only, to discharge the lessee of all quit-rents out of the land, this covenant is only personal, and will bind the covenantor only during his life (*b*). But if in these cases the words "during the term" be added in the

(*u*) *Hyde* v. *The Dean of Windsor*, Cro. Eliz. 533; *Siboni* v. *Kirkman*, 1 M. & W. 418, 423, *per* Parke, B. An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor: *Chamberlain* v. *Williamson*, 2 M. & S. 408. The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only, and not for general damages: *Finlay* v. *Chirney*, 20 Q. B. D. 494.

(*x*) *Marshall* v. *Broadhurst*, 1 Tyrwh. 349, by Lord Lyndhurst. In *Wentworth* v. *Cock*, 10 A. & E. 45, Patteson, J., said that there was a case at Liverpool where a contract to build a lighthouse was held to be personal, on the ground of its being a matter of personal skill and science. So a contract to play a piano at a concert has been held to be one requiring personal skill, and to be conditional on the contractor being well enough to perform: *Robinson* v. *Davison*, L. R. 6 Exch. 269, 274.

(*y*) *Baxter* v. *Burfield*, Bott. P. L. pl. 696, 6th edit.; *S. C.*, 2 Stra. 1266; *post*, p. 1402.

(*z*) *Cooke* v. *Colcraft*, 2 W. Bl. 856; 3 Wils. 380.

(*a*) Touchst. 178. But see Wentw. Off. Ex. p. 250, 14th edit. *contrà*. And see now Conveyancing and Law of Property Act, 1881, s. 10.

(*b*) Touchst. 178; *Ingery* v. *Hyde*, Dyer, 114, *a*. But see Wentw. Off. Ex. *ubi supra*. And see now Conveyancing and Law of Property Act, 1881, s. 11.

covenant, as on a covenant by a lessee for himself to repair the houses during the term, or on a covenant by a lessor for himself to discharge the lessee of all quit-rents during the term: in these cases, it appears, the executors and administrators also will be charged after his death (*c*).

In *Wentworth* v. *Cock* (*d*), the plaintiffs had entered into an agreement with one Cock to supply him with a certain quantity of slate immediately; and with a certain other quantity, monthly, at a fixed price; and with any further quantity, monthly, that he might require: He engaged to receive the slate, not exceeding 200 tons per month, and the agreement was to be in force till January 1st, 1838: An action having been brought against his administrator, for refusing to receive slate sent, in pursuance of the contract, after his death, and before January 1st, 1838, it was contended that the contract was personal to the deceased, and was not obligatory on his representatives: But the Court of Queen's Bench held that the plaintiff might well sue the administrator: And Lord Denman said, it was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for: And Littledale, J., observed, that the administrator was bound to pay damages, out of the assets, if he did not take the contract upon himself. In *Cooper* v. *Jarman* (*e*), where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by Lord Romilly, M. R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

But it must be borne in mind that the authority of an agent is revoked by the death of his principal: consequently the agent cannot, generally speaking, sue the executor of the principal in respect of services as agent after his death, though performed in pursuance of a contract made with him in his lifetime (*f*). Thus, in *Campanari* v. *Woodburn* (*g*), where A. had agreed with

(*c*) Touchst. 178, 482. See also *Williams* v. *Burrell*, 1 C. B. 402.

(*d*) 10 A. & E. 42.

(*e*) L. R. 3 Eq. 98, followed in *Re Day*, [1898] 2 Ch. 510, in which case, however, it was also held that where a testator contracted to build upon land belonging to the devisee by an independent title, the latter could not, in the absence of consideration for the contract, have the buildings completed at the cost of the personal estate.

(*f*) As to persons acting under powers of attorney, see *ante*, p. 681 *et seq.*

(*g*) 15 C. B. 400.

B. that he would endeavour to sell a picture belonging to B., and that if he succeeded in selling the same, B. should pay him 100*l.*; and B. died before his picture was sold; it was held that A. could not recover the 100*l.* from B.'s executor.

It must here be observed, that in the case of *Perrot* v. *Austin* (*h*), it is said to have been resolved by the Court that if one covenants that his executors shall pay 10*l.*, no action lies for this against them. But Lord Mansfield, in *Plumer* v. *Marchant* (*i*), said that *Perrot* v. *Austin* was an extraordinary case, and there is a query in the very report (*k*). And in *Powell* v. *Graham* (*l*), it was held that an action might be sustained against an executor, upon a promise by the testator, that his executor should pay to the plaintiff the sum of 20*l.* in consideration that the plaintiff would continue in the service of the testator till his death; and that it was not necessary to aver any promise by the executor to pay it.

In matters of tort:

With regard to the liability of an executor in respect of the tortious acts of the deceased, it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed (*m*): and at this day (unless the case falls within the statute 3 & 4 Will. IV. c. 42, s. 2, hereafter to be mentioned) (*n*), where the cause of action is founded upon any *malfeasance or misfeasance*, is a tort, or arises *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and

(*h*) Cro. Eliz. 382.

(*i*) 3 Burr. 1383.

(*k*) In fact it appears from the statement of the case in Wentw. Off. Ex. p. 250, 14th edit., that the decision of *Perrot* v. *Austin* was merely as to the form of action. "In some cases," says that author, "no action of debt lieth upon a covenant to pay money; as if A. covenant that his executor shall within a year, or such a time after his death, pay 10*l.* to B.; now for that no action of debt was maintainable against A. himself, it lieth not against his executor, but only an action of covenant; as was held in the late Queen's time." See *Randall* v. *Rigby*, 4 M. & W. 132, *per* Parke, B.; and *Ex parte Tindal*, 8 Bing. 402; *S. C.*, 1 M. & Scott, 607, where Tindal, C. J., and Littledale, J., expressed their opinion, in which Lord Brougham concurred, that if a man covenants that his executors shall pay a sum of money after his death, this creates a debt just as much as if he himself had covenanted to pay it.

(*l*) 7 Taunt. 580.

(*m*) 1 Saund. 216, *a*, note (1) to *Wheatley* v. *Lane*; *Kirk* v. *Todd*, 21 C. D. 484, 489; *Re Duncan*, [1899] 1 Ch. 387.

(*n*) *Post*, p. 1361.

battery, slander, deceit, diverting a watercourse, obstructing lights, and in many other cases of the like kind, where the *declaration* imputes a tort done either to the person or property of another, and the *plea* must be not guilty, the rule is *actio personalis moritur cum personâ;* and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator (*o*). But the case is different where the act is not a mere tort, but is a breach of a

(*o*) 1 Saund. 216, *a*, note (1). An action for compensation for losses occasioned by misrepresentations contained in a prospectus of a company is like an action at law for deceit, and is therefore of a personal character, and the estate of a deceased director not being alleged and proved to have received benefit from the deceit, his executors cannot be made liable to compensate the person who asserts that he has been injured by it: *Peek* v. *Gurney*, L. R. 6 H. L. 377. And though there is a decree against the deceased defendant for damages, yet if he die before they have been ascertained, the action, being one of tort, dies at the moment of his death, and the proceedings cannot be continued against the personal representatives of the deceased: *Davoren* v. *Wootton*, [1900] 1 I. R. 273. Similarly, where certain worthless shares were bought from a testator, the purchaser was held not entitled to prove against his estate in an administration action for damages for the testator's misrepresentation, the claim being for unliquidated damages, and not for the recovery of any asset which the plaintiff could claim: *Re Duncan*, [1899] 1 Ch. 387. In the case of *New Sombrero Phosphate Co.* v. *Erlanger*, 5 C. D. 73 (affd. 3 App. Cas. 1218), the estate of a deceased member of a syndicate was held liable on the ground that he was a partner, and that the action therefore did not die with him. See as to form of defence in actions against a partnership, where one of the partners has died after writ and appearance, *Ellis* v. *Wadeson*, [1899] 1 Q. B. 714; and cf. *Phillips* v. *Homfray*, 24 C. D. 439, and *Re Shephard*, 43 C. D. 131, with regard to the case of the death of a partner after judgment has been obtained against the partnership. Nor can the executors of a deceased director be made liable in any proceeding which is of the nature of an action of negligence (*e.g.*, where it is sought to charge them for loss beyond the amount of the money placed in the directors' hands): *Overend, Gurney & Co.* v. *Gurney*, L. R. 4 Ch. 701; L. R. 5 H. L. 480. It has been held that the executors of a deceased director, not being officials of a company, cannot be proceeded against by summons taken out under the provisions of the 25 & 26 Vic. c. 89, sect. 165 (Companies Act, 1862): *Re British Guardian Life Assurance Co.*, 14 C. D. 335, following *Feltom's Executors' Case*, L. R. 1 Eq. 219. Whether the maxim, "*Actio personalis*," &c., applies in the case of a deceased director who may have incurred liability under sect. 3 of the Directors' Liability Act, 1890, *quære:* see *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504.

quasi contract, where the claim is founded on breach of a fiduciary relation, or on failure to perform a duty (*p*).

Accordingly, no action lies against an executor or administrator on a penal statute (*q*). So if a man, served with a *subpœna*, and having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator (*r*). Again, if a sheriff, gaoler, or keeper of a prison, suffered one in execution for debt or damages to escape, though hereby the party, at whose suit the execution was, was entitled not only to an action upon the case against such officer by the common law, but also to an action of debt by the statutes Westm. 2, and 1 Rich. II. c. 12; yet if the officer died, no action lay against his executor for the same; because the suffering the escape was a wrong of the nature of a trespass (*s*). So at the common law, if a man was appointed executor, and committed a *devastavit* and died, the executor of such executor was not liable for the *devastavit*, upon the principle that it was a personal tort in his testator, which died with the person (*t*). But now, by the statute 30 Car. II. c. 7, explained and made perpetual by 4 & 5 Will. & Mary, c. 24, s. 12, the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if he had been living (*u*).

(*p*) *Concha* v. *Murrieta*, 40 C. D. at p. 553 (*per* Cotton, L. J.); *Peebles* v. *The Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159 (where the alleged cause of action arose out of a statutory duty to the deceased); *Blyth* v. *Fladgate*, [1891] 1 Ch. 366 (where the claim arose out of negligence of a solicitor).

(*q*) Wentw. Off. Ex. 255, 14th edit.

(*r*) *Ibid.*

(*s*) *Anon.* Dyer, 271, *a*; *Whitacres* v. *Ousley*, Dyer, 322, *a*; *Perkinson* v. *Gilford*, Cro. Car. 540; Bro. Escape, 28 Exors. 100; Execution, 86 Parliament, 80; Wentw. Off. Ex. 254, 14th edit.; *Berwick* v. *Andrews*, Lord Raym. 973, by Lord Holt; *Hambly* v. *Trott*, 1 Cowp. 375; 1 Saund. 216, *a*, note (1). But debt lies against the executors of a sheriff, &c., upon a judgment obtained against the testator for an escape. See *post*, p. 1367.

(*t*) *Sir Brian Tucke's Case*, 3 Leon. 241; *Browne* v. *Collins*, 1 Ventr. 292. But he was liable in equity: *Price* v. *Morgan*, 2 Chanc. Cas. 217.

(*u*) 1 Saund. 219, *d*, note to *Wheatley* v. *Lane*; *Coward* v. *Gregory*, L. R. 2 C. P. 153. In the case of *Hammond* v. *Gatliffe*,

In some, however, of the cases above mentioned, a remedy might be had against the executor or administrator in another form: Thus, although, at the common law, an action of trover upon a conversion of the testator dies with him, yet if the goods, &c., taken away, continue still *in specie*, in the hands of the executor or administrator of the wrong-doer, replevin or detinue will lie against such executor or administrator to recover them back (*x*): or trover, laying the conversion to have been by the executor (*y*): or, in case they are sold, an action for money had and received to recover their value (*z*). Again, an action on the custom of the realm against a common carrier is for a tort and supposed crime; and the plea is not guilty; therefore, at the common law, it will not lie against the carrier's executors: But an action of *assumpsit* will lie against them, upon the very same cause (*a*). So if a man take a horse of another, and bring him back again, an action of trespass will not lie, at the common law, against his executor, though it would against him: but an action for the use and hire of the horse will lie against the executor (*b*). So if a man deals as agent for another without authority, his executor, though he cannot be sued for the tort, may be made liable for breach of an implied warranty of authority (*c*).

in some cases remedy might be had in another form:

So in the case of *Perkinson* v. *Gilford* (*d*), debt was brought

Andr. 254, the Court were strongly inclined to be of opinion that an executor *de son tort* of an executor *de son tort* is not liable at common law for a *devastavit* committed by the first; and that such an executor is not within the statute of Car. II.; because (as Probyn, J., said) in the first part of the Act executors *de son tort* are not named, though afterwards they are expressly mentioned.

(*x*) *Le Mason* v. *Dixon*, W. Jones, 173, 174; 1 Saund, 217, note (1).

(*y*) *Hambly* v. *Trott*, 1 Cowp. 373.

(*z*) *Ibid.* 377; 1 Saund. 217, note (1).

(*a*) Cowp. 375, by Lord Mansfield; S. P. by Sir J. Mansfield, C. J., in *Powell* v. *Layton*, 2 New Rep. 370.

(*b*) *Hambly* v. *Trott*, 1 Cowp. 375, by Lord Mansfield.

(*c*) *Collen* v. *Wright*, 7 E. & B. 301; *S. C.* in Error, 8 E. & B. 647. Cf. *Halbot* v. *Lens*, [1901] 1 Ch. 344. A public servant acting on behalf of the Crown is not, however, liable in such a case for a breach of implied warranty of authority: *Dunn* v. *Macdonald*, [1897] 1 Q. B. 401, 555; nor therefore could his executor be sued for such breach. Though the executor of an innkeeper cannot be sued in tort for the loss of a guest's goods (unless under stat. 3 & 4. Will. IV. c. 42, s. 2, *post*, p. 1361), he may be sued on an implied *assumpsit*: *Morgan* v. *Ravey*, 2 Fost. & F. 283; 6 H. & N. 265. Cf. *Robb* v. *Green*, [1895] 2 Q. B. 1, 315.

(*d*) Cro. Car. 539. Where an under-sheriff (since deceased) acting

against the executors of a sheriff, for money which he had levied under a *fi. fa.* and had not paid over: the not paying over the money was a misfeasance as well as a nonfeasance, yet it was determined, that by the receipt of the money, the sheriff became debtor, and that debt might be maintained for it; that is to say, though he was guilty of a breach of his duty as sheriff, and though no action could be maintained for that breach of duty after his death, yet for the money so recovered his executors were chargeable.

action for mesne profits:

Again, at the common law, an action of trespass for mesne profits cannot be maintained against an executor or administrator (*e*): yet he is, perhaps, liable in an action for use and occupation for the rent up to the day of the demise in the action of ejectment (*f*). But if there has been a recovery in ejectment, it is clear that no action will lie against the executor for use and occupation for the rent subsequent to the day of demise laid in the declaration; because, having treated the holding as founded on trespass, the plaintiff cannot afterwards treat it as founded on contract (*g*): And in such instances the simple case of the death of the occupier will not sustain a bill in equity for an account of mesne profits under the head of accident (*h*): However, an account of mesne profits, since the title accrued, was decreed against executors, upon a special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the Court of Law, and by an injunction at the

as sheriff during the vacancy of the shrievalty, under 3 Geo. I. c. 15, s. 8 (see 50 & 51 Vict. c. 55, s. 25), wrongfully retained the proceeds of an execution, it was held by the Court of Appeal, affirming the Divisional Court, that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully recovered: *Gloucestershire Banking Co.* v. *Edwards*, 20 Q. B. D. 107. See also *Packington* v. *Culliford*, 1 Roll. Abr. 921, tit. Exors. H. pl. 2.

(*e*) *Pulteney* v. *Warren*, 6 Ves. 72, 86. See *per* Bowen and Fry, L. JJ., in *Phillips* v. *Homfray*, 24 C. D. 439, 458.

(*f*) 6 Ves. 86; *Turner* v. *Cameron's Coalbrook Co.*, 5 Exch. 932.

(*g*) *Birch* v. *Wright*, 1 Term Rep. 378. See also *Pulteney* v. *Warren*, 6 Ves. 72, 87; and *Bridges* v. *Smyth*, 5 Bing. 410; *S. C.*, 2 Moo. & P. 740. However, the mere *bringing* of an ejectment and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation: *Cobb* v. *Carpenter*, 2 Campb. 14, note to *Balls* v. *Westwood*. *Secus*, *semble*, if the ejectment has been served on the lessee: *Jones* v. *Carter*, 15 M. & W. 718.

(*h*) *Pulteney* v. *Warren*, 6 Ves. 88.

instance of the occupier; who ultimately failed both at law and in equity (*i*): And in the case of *Monypenny* v. *Bristow* (*k*), the widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the Will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died: On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held by Sir J. Leach, M. R., and afterwards by Lord Brougham on appeal, that the suit was maintainable for the rents received during her continuance in possession (*l*).

action for waste:

So an action of waste does not lie, at the common law, against an executor, for waste committed by his testator; it being a tort which dies with the person (*m*): Nor shall an executor be

(*i*) *Pulteney* v. *Warren*, 6 Ves. 72.

(*k*) 2 Russ. & M. 117.

(*l*) See also *Caton* v. *Coles*, L. R. 1 Eq. 581.

(*m*) 2 Inst. 302; 2 Roll. Abr. 828, pl. 7; 2 Saund. 252, note to *Green* v. *Cole*. A bill was brought against the executors of a jointress, to have satisfaction out of assets for permissive waste upon the jointure of the testatrix: But by Cowper, C., "The bill must be dismissed; for here is no covenant that the jointress shall keep the jointure in good repair, and in the common case, without some particular circumstances, there is not remedy in law or equity for permissive waste after the death of the particular tenant:" *Turner* v. *Buck*, 22 Vin. Abr. p. 523, pl. 9, tit. Waste (s. a.). The produce, proceeds, or value of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary—as such lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognizes in this indirect benefit which he may have received any ground for proceedings against his executors: *Phillips* v. *Homfray*, 24 C. D. 439, 455. The liability of a tenant for life for permissive waste seems to have been for a long time an open question. It was supposed that there was a passage by Lord Coke, 2 Inst. 145, affirming the liability, and Parke, B., in *Yellowly* v. *Gower*, 11 Exch. 274, 294, says, speaking of permissive waste: "We conceive that there is no doubt of the liability of tenants for term of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53." But Kay, J., in *Re Cartwright*, 41 C. D. 532, points

chargeable for the injury done by his testator in cutting down another man's trees: But for the benefit arising to his testator

out that Coke's words, 2 Inst. 145, only include permissive waste where there is an obligation to repair; and that in effect he says that where the grantor imposes the obligation to repair, it is waste to allow the property to go out of repair. And the learned judge further refers to the case of *Powys* v. *Blagrave*, 4 De G. M. & G. 448, where Lord Cranworth, L. C., said that in the case of a tenant for life even legal liability for permissive waste was very doubtful, and decided most certainly that in equity no interference whatever would be made on the ground of permissive waste by a tenant for life. This view was followed by Kay, J., in the above-mentioned case, who expressly held that the estate of a legal tenant for life is not liable for permissive waste, after having had cited to him *Davies* v. *Davies*, 38 C. D. 499, in which Kekewich, J., held that a tenant for years is liable for permissive waste, and apparently would have held that a tenant for life was in the same position.

The liability of a tenant for life for permissive waste where there is an obligation to repair has never been doubted; and thus in *Woodhouse* v. *Walker*, 5 Q. B. D. 404, where a devise of premises for life provided that the tenant for life should keep the premises in repair, it was held that an action of tort for permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under 3 & 4 Will. IV. c. 42, s. 2, if brought within the period of limitation, against her executor after her death. See also *Batthyany* v. *Walford*, 36 C. D. 269; *Blackmore* v. *White*, [1899] 1 Q. B. 293. As to leaseholds held upon trust to be enjoyed in specie, in *Re Courtier*, 34 C. D. 136, where the widow tenant for life had kept the property in the state in which it came to her, but denied that she was liable to do the repairs which had become necessary during the lifetime of the testator, it was decided that as between tenant for life and remainderman there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases, and that it was the duty of the trustees to repair the houses in accordance with the covenants in the leases out of the *corpus* of the estate (*per* Cotton, L. J., at p. 139). In *Re Tomlinson*, [1898] 1 Ch. 232, where a testator, who died possessed of a leasehold house held by him on a repairing lease, bequeathed it directly (without the intervention of trustees) to his niece for life, and after her death to other persons absolutely, Kekewich, J., held, as between tenant for life and remaindermen, that the tenant for life was not bound to perform any of the covenants in the lease. North, J., in *Re Betty*, [1899] 1 Ch. 821, differed from Kekewich, J., in *Re Tomlinson*, and held that an equitable tenant for life of leaseholds under a Will is bound during the continuance of his interest as between himself and his testator's estate to perform the tenant's continuing obligations under the lease; but that he is not liable for repairs necessary at the commencement of

from the sale or value of the trees, he shall (*n*). Accordingly, in *Powell* v. *Rees* (*o*), it was held that an executor is liable to an action for money had and received by his testator, for coal tortiously taken by him from the plaintiff's land, if the testator had sold it, and received the money: And this although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. So Lord Chancellor Cowper held, in the case of *The Bishop of Winchester* v. *Knight* (*p*), that the lord of a manor might bring a bill for an account of ore dug, or timber cut by the defendant's testator: And his Lordship observed, that it would be a reproach to equity, to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy: And his Lordship further remarked that it was true, as to the trespass of breaking up meadow, or ancient pasture ground, it died with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it had been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it. So if a man commits equitable waste, and dies, as where tenant for life without impeachment of waste, and as such having a right at law to cut timber on the estate, and a property in the

his interest, or in respect of breaches of covenant which had arisen before the testator's death. The question again came before Kekewich, J., in *Re Gjers*, [1899] 2 Ch. 54, and in deference to the opinion of Stirling, J., in *Re Redding*, [1897] 1 Ch. 876, the considered judgment of North, J., in *Re Betty*, and the opinion of the Vice-Chancellor of Ireland in *Kingham* v. *Kingham*, [1897] 1 I. R. 170, "that a tenant for life, whether legal or equitable, is within the maxim, *qui sentit commodum sentire debet et onus*," he decided that a tenant for life of leaseholds, specifically bequeathed by the Will of a testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself and the testator's estate, to pay the rent reserved by the lease, and perform the covenants and conditions contained in it. The estate of a tenant for life of leaseholds is not, however, liable to the *remainderman* for repairs made necessary by the non-fulfilment during the life tenancy of covenants to repair: *Re Parry and Hopkins*, [1900] 1 Ch. 160. See further, *post*, p. 1399.

(*n*) *Hambly* v. *Trott*, 1 Cowp. 376, by Lord Mansfield.

(*o*) 7 A. & E. 426.

(*p*) 1 P. Wms. 406. See *Powell* v. *Aiken*, 4 K. & J. 352, *per* Wood, V.-C.

trees, abuses that power, by cutting ornamental trees, or trees not ripe for cutting, a Court of Equity has jurisdiction to make the personal representatives of the party, who has committed such waste, accountable for the produce of it (*q*). But a Court of Equity will not direct an account, against the executor or administrator of tenant for life without impeachment of waste, of dilapidations permitted by him in and about the mansion-house (*r*).

Again, an action would not lie against the executor of a parishioner, by whom tithes were subtracted, to recover the treble value under the statute of Edward the Sixth, even although the testator were a lessee for years so that his estate came to his executor; for, being founded on a personal tort, it died with the person (*s*). But the executor would have been liable in another form of proceeding; for the tithes, when severed, belonged to the tithe-owner; and the case, therefore, fell within the principle that where property is acquired which benefits the testator, an action for the value of the property shall survive against the executor (*t*).

It may here be mentioned that the personal representative of the mother of a bastard child is not liable for necessaries supplied to the child after her death (*u*).

Profits arising from a wrong done can be followed against the estate of the wrong-doer.

The only cases outside the statute 3 & 4 Will. IV. c. 42, presently referred to, in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is

(*q*) *Lansdowne* v. *Lansdowne*, 1 Madd. 116.

(*r*) *Lansdowne* v. *Lansdowne*, 1 J. & W. 522; *Re Cartwright*, 41 C. D. 532; *ante*, p. 1357, note (*m*).

(*s*) Wentw. Off. Ex. 254, 14th edit.; *Holl* v. *Bradford*, 1 Sid. 88; *Weekes* v. *Trussell*, 1 Sid. 181; *Moreton* v. *Hopkins*, 2 Keb. 502; Com. Dig. Admon. (B.) 15.

(*t*) By Lord Eldon, in *Pulteney* v. *Warren*, 6 Ves. 89, 90.

(*u*) *Ruttinger* v. *Temple*, 4 Best & Sm. 491.

complained of, and an indirect benefit may have been reaped thereby. The profits, arising from a wrong done by a deceased man, which can be followed against his estate, are only such profits as take the shape of property, or the proceeds or value of property, withdrawn from the rightful owner and acquired by the wrong-doer (*x*).

By stat. 3 & 4 Will. IV. c. 42, s. 2, after reciting that there is no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy thereof it is enacted, "that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death (*y*), and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in

3 & 4 Will. IV. c. 42:

actions may be brought against executors for an injury to property real or personal, by the testator, committed six months before his death: within what time to be brought.

(*x*) See the judgment of Bowen, L. J., and Cotton, L. J., in *Phillips* v. *Homfray*, 24 C. D. 439, in which case Baggallay, L. J., dissented from the other members of the Court, expressing his opinion thus: "The general result of these cases, and of others to the like effect, may be thus stated, that a Court of Equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the Court." *Ibid.* p. 476. In *Re Duncan*, [1899] 1 Ch. 387, it was held that, where there was nothing among the assets of the deceased that at law or in equity belonged to the claimant, and the damages which had been done to him were unliquidated and uncertain, the executors of the wrong-doer could not be sued merely because his estate might have benefited by the wrong complained of.

(*y*) Where the plaintiff brought his action for damages and an injunction against the firm of T. & Co. for fouling a stream which caused no benefit to the defendants, and the firm consisted of T. alone who died more than six months after the commencement of action, and the action was continued against his executors, it was held that, T. having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his executors although the action had been commenced in the lifetime of the testator and although the executors continued the business in the name of the firm: *Kirk* v. *Todd*, 21 C. D. 484.

like order of administration as the simple contract debts of such person."

It was held in the case of *Powell* v. *Rees* (*z*), where coal had been tortiously taken from the plaintiff's land by an intestate, who had sold it and received the money, and part had been raised more than six months before his death, and part within six months, that the plaintiff might bring trespass, under this statute, against the administrator, for so much as was raised within the six months, and also money had and received for so much as was raised before (*a*); the acts being distinct, and therefore the two actions not incompatible.

In *Richmond* v. *Nicholson* (*b*), which was an action of trover for a watch against the defendant, as the executor of one Harriet Reeves, the declaration stated that Harriet Reeves died on March 27th, 1839, and alleged a conversion by her within six calendar months next before her decease: The defendant pleaded, that Harriet Reeves was not guilty within six calendar months before the time of her death: It appeared on the trial that the watch had been given by Harriet Reeves to one Spencer, in September, 1837; that Spencer redelivered it to her in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff in December, 1838, Harriet Reeves said, "I shall not talk to you any more, but shall see my solicitor:" She died in March, 1839: And the Court of Common Pleas held, that this was sufficient evidence of a conversion within six months before her death.

Liability of executor of incumbent, &c., for dilapidations.

In conclusion of this branch of the subject, it may be mentioned, that an action on the case lies, by the custom of England, as it is sometimes expressed, but to speak more correctly, by the common law, against the executors of a parson, vicar, or other ecclesiastical person, at the suit of his successor, for dilapidations of the houses or buildings upon his spiritual benefice (*c*). So an action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against the executor of his predecessor (*d*). The law is the same as to a

(*z*) 7 A. & E. 426, *ante*, p. 1359.

(*a*) *Ante*, p. 1359.

(*b*) 8 Scott, 134.

(*c*) Wentw. Off. Ex. 255, 14th edit. And by stat. 13 Eliz. c. 10, s. 2, if any spiritual person fraudulently grants away his goods, &c., so as nothing be left to his executors, such grantee shall be liable to the successor's suit in any Court Ecclesiastical, as he might have been, if the grantee was executor of the grantor.

(*d*) *Radcliffe* v. *D'Oyly*, 2 T. R. 630, 637.

perpetual curate (*e*). And such an action is maintainable where the hedges and fences belonging to the glebe are left in a state of decay, or where there has been a felling of timber growing thereon, otherwise than for repairs or fuel (*f*). But it will not lie in respect of pulling down a building on the rectory and substituting another in a different part, unless the value of the estate be impaired, the burthens on it increased, or the evidence of title impaired (*g*). Moreover, neglect to cultivate the glebe land in a husbandlike manner is not a dilapidation for which the executors of an incumbent are liable (*h*). Nor will an action lie for digging gravel in the glebe (*i*). Formerly, indeed, it was doubted whether any action at law, or elsewhere than in the Spiritual Court, would lie for dilapidations, even by a succeeding rector, &c., against his predecessor who had vacated by cession or otherwise (*k*): but that point was determined in *Jones* v. *Hill*, 2 Will. & Mary (*l*): And the Temporal Courts having once taken cognizance of such matters, it would seem that the action was considered to lie against the executors of a deceased rector, &c., from the necessity of the thing; and such actions have not infrequently been brought (*m*). If the successor dies, without having enforced the right of action, it survives to his executor, who being himself liable to the third incumbent for the whole of the dilapidations existing at the death of his own testator, may recover from the executor of the first incumbent for so much of them as occurred during the first incumbency (*n*).

The reason for the liability of the executor or administrator for such dilapidations was thus stated by Lord Chief Justice Willes, in *Sollers* v. *Lawrence* (*o*), "Because it is not considered as a tort in the testator, but as a duty which he ought to have performed; and therefore his representatives, so far as he left

(*e*) *Mason* v. *Lambert*, 12 Q. B. 795.

(*f*) *Bird* v. *Relph*, 4 B. & Adol. 826, 830.

(*g*) *Huntley* v. *Russell*, 13 Q. B. 572. See further *S. C.*, as to what are acts of Waste, for which this action lies.

(*h*) *Bird* v. *Relph*, 4 B. & Adol. 826.

(*i*) *Ross* v. *Adcock*, L. R. 3 C. P. 655.

(*k*) See the observation of Buller, J., in *Radcliffe* v. *D'Oyly*, 2 T. R. 637. It is said in Wentw. Off. Ex. p. 255, 14th edit. that the executors are liable, *by the spiritual or ecclesiastical law.*

(*l*) 3 Lev. 268.

(*m*) See the judgment of Buller, J., in *Radcliffe* v. *D'Oyly*, *ubi supra.*

(*n*) *Bunbury* v. *Hewson*, 3 Exch. 558.

(*o*) Willes, 421.

assets, shall be equally liable as himself: And, for this reason, it is not contrary to the rule, that *actio personalis* (which is always understood of a *tort*) *moritur cum personâ*." It is observable, however, that this action is in form an action on the case in *tort;* and that it could not possibly be framed in *assumpsit*, as on a contract; for the plaintiff must be the succeeding rector, &c., who cannot be known until after the death of the predecessor, and of course could not contract with him: It is clearly an exception to the general rule that no action will lie against an executor to which his testator was not liable, for the testator never can be liable, inasmuch as during his life there is no person who can sue. For the same reason this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum personâ;* an action cannot be said to die, which never had nor could have had existence. It seems, therefore, not to be quite correctly stated, that "the executor shall be equally liable as the testator."

34 & 35 Vict. c. 43 (Ecclesiastical Dilapidations Act, 1871).

The liability of the representatives of a deceased incumbent to answer for dilapidations is now governed by stat. 34 & 35 Vict. c. 43 [Ecclesiastical Dilapidations Act, 1871]. By this Act the bishop within three calendar months directs the diocesan surveyor to inspect the premises and report what sum, if any, is required to make good the dilapidations (*p*) (sect. 29). The surveyor sends a copy of his report to the bishop, new incumbent and the representatives of the late incumbent (sect. 30), to which report opportunity to object is given (sects. 32—33). The bishop makes an order stating the repairs and their cost, for which such representatives are liable, and a copy of such order is delivered to them (sects. 34 and 35). The sum stated in the order as to the cost of repairs is a debt due from the representatives of the late incumbent and is recoverable in law or in equity (*p*) (sect. 36). No sum is recoverable for dilapidations in respect of any benefice unless the claim for such sum is founded on an order made under the provisions of the Act (sect. 53).

An allotment made to a vicar in lieu of tithes, under an Inclosure Act, is subject to the law and custom of England,

(*p*) The sum stated in the bishop's order as the cost of repairs is, under sect. 36, a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors: *Re Monk*, 35 C. D. 583. See *ante*, pp. 777, 778.

as to dilapidations, equally with the ancient glebe; and if, when he comes into it, there are fences upon it which he ought to repair, but he dies leaving them unrepaired, his executors are liable at the suit of his successor (*q*).

Extent to which executor of administrator of rector is liable for dilapidations.

It may be convenient to investigate, in this place, the *extent* to which the executor or administrator of a rector, &c., is liable for dilapidations. In *Percival* v. *Cooke* (*r*), Best, C. J., expressed an opinion at *nisi prius*, that the representatives of a prior incumbent are only liable for such repairs as an outgoing tenant would be bound to perform, and not for complete and finished repairs (*s*). In *Wise* v. *Metcalfe* (*t*), the subject was fully considered by the Court of King's Bench: and the Judges of that Court were of opinion that the incumbent is bound to maintain the parsonage (which must be assumed to be suitable in point of size, and other respects, to the benefice) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement (*u*); and that he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong: And that on this principle the damages must be calculated in an action for dilapidations against the executor or administrator of a deceased rector by the successor.

The successor may have separate actions against the executor or administrator of the late rector, for dilapidations to different parts of the rectory (*x*).

Liability of executor for breaches of

It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a

(*q*) *Bird* v. *Relph*, 2 Adol. & Ell. 773; 1 Nev. & M. 415.

(*r*) 2 Car. & P. 460.

(*s*) And his Lordship in that case expressed his further opinion, that the executors were entitled to be allowed, in such estimate, for timber which the late incumbent might have cut and used in such repairs, and which his successor had used for that purpose. See also as to stone and timber, which could be got from the glebe: *Bunbury* v. *Hewson*, 3 Exch. 558.

(*t*) 10 B. & C. 299.

(*u*) In *North* v. *Baker*, 3 Phillim. 309, Sir John Nicholl intimates that, in some cases, the thorough repair of old building is not all to fall on one incumbent. As to when the incumbent may remove hothouses, see *Martin* v. *Roe*, 7 E. & B. 237.

(*x*) *Young* v. *Munby*, 4 M. & S. 183.

trust by testator.

breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not (*y*).

It is no bar to an action against an administrator on a covenant made by the deceased that the defendant took out administration on a parol promise of the plaintiff that he would not sue.

It may here be observed, that if an action is brought against an administrator for a breach of a covenant made by the deceased, it cannot be pleaded in bar that the defendant took out administration at the request of the plaintiff, and on his promise, *not under seal*, that he would not charge, or seek to charge, the defendant as administrator or otherwise with any breaches of the covenant in question (*z*).

(*y*) *Adair* v. *Shaw*, 1 Sch. & Lef. 272; *Montford* v. *Cadogan*, 17 Ves. 489; *Walsham* v. *Stainton*, 1 De G. J. & S. 678; 1 H. & M. 322. In *Ramskill* v. *Edwards*, 31 C. D. 100, directors were held liable for breach of trust in advancing money of the company upon an unauthorised security. A defendant died after the commencement of the action, and it was held that the liability to contribute survived against his estate. If a trustee commit a breach of trust, and the consequences of it do not occur until after his death, his estate is liable, though if redress had been sought in respect of that breach of trust it was reparable in his lifetime. And this is true as well in the case of wilful default as of an active breach of trust: *Devaynes* v. *Robinson*, 24 Beav. 86, 95. A testator entitled to shares in a company with unlimited liability, directed his executors to convert his estate with all convenient speed. P., one of these executors, died a year and five weeks after the testator. The shares were not converted, and about fifteen years afterwards the company was wound up, and the surviving executors being placed on the list of contributories, paid a large sum out of the estate for calls. A bill was filed against the surviving executors and the executors of P. to make them liable for the loss. P.'s executors did not answer, nor did they in evidence give any reason why conversion had not taken place within a year from the testator's decease; and it was held (affirming Stuart, V.-C.), that P.'s estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within a year: and that as P.'s executors had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject: *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605.

(*z*) *Harris* v. *Goodwyn*, 2 M. & Gr. 405. Perhaps the defendant might have been relieved by application to the Court to restrain the action: *Per* Tindal, C. J., *ibid.* 418: Since the Judicature Act, 1873 (s. 24 (5)), any such relief must be sought by raising any equity as a defence in the action.

SECTION II.

Of particular instances where the Executor or Administrator is liable with respect to the Acts of the Deceased.

In the preceding section, it has been attempted to collect the principal cases illustrative of the general principle as to the liability of executors and administrators with respect to claims which might be enforced against the deceased himself, if he were living: It remains to advert to some particular instances in which such liability has been established.

Debts of record:

First, as to debts of record. The executor or administrator is bound, as far as he has assets, to satisfy all judgments recovered against the testator or intestate, without regard to the circumstance whether a judgment was founded on a cause of action which would not have survived his death: Thus, although the executor of a sheriff is not liable to be sued for an escape permitted by his testator (*a*), yet, if judgment was recovered for such escape against him in his lifetime, his executor is liable upon the judgment (*b*).

Statutes and recognizances:

An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased (*c*); and upon all the inferior debts of record of the deceased, as fines imposed by the Justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers or of bankrupts, by stewards in leets, or the like (*d*).

liability of executor on joint contracts of testator:

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (*e*): And if all the parties are dead,

(*a*) See *ante*, p. 1354.

(*b*) *Whitacres* v. *Onsley*, Dyer, 322, a. b.

(*c*) It seems to have been once doubted whether the executor of the conusor of a statute merchant was liable: See Wentw. Off. Ex. c. 11, p. 243, 14th edit.

(*d*) Wentw. Off. Ex. c. 11, p. 240: but see Anon. Cro. Jac. 219.

(*e*) *Godson* v. *Good*, 2 Marsh. 300, by Gibbs, Ch. J. S. C. 6 Taunt. 594. No particular words are necessary to constitute a covenant of either kind (that is to say, either joint or several). If two covenant generally for themselves without any words of severance, or that they *or* one of them shall do such a thing, a joint charge is created: *White* v. *Tyndall*,

the executor of the survivor is alone liable: Thus, if two retain an attorney, and both die, the executor or administrator of the survivor only shall be charged, and not the executors of both: for a personal contract survives of both parties; otherwise of real contracts, as warranty: and therefore, where, in an action against the executors of both, they pleaded jointly, and judgment was given for the attorney, it was stayed on motion, because the executor of the survivor only was chargeable, notwithstanding the pleading and admission of the parties (*f*).

So in debt upon bond, it appeared upon oyer that A., B., and C. were bound jointly, and that A. was dead; whereas the action was brought against his executor and the other two: Upon demurrer, the Court were of opinion, that the action was not well brought: for by the death of one of the obligors, his executor is wholly discharged (*g*).

Where testator a sole defendant dies before judgment.

If a testator being a *sole* defendant dies *before* judgment by Ord. XVII. r. 1 (R. S. C. 1883), if the cause of action survive or continue, that is to say, if it does not fall within the rule *actio personalis moritur cum personâ*, the action shall not abate, but the plaintiff may, under Rule 4 of the same order, obtain an order that the personal representative of the deceased be added as a party. This order, it seems, may be obtained *ex parte*. Further, by Ord. XVII. r. 1, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the

Where testator a sole defendant dies between the verdict or

13 A. C. 263, 269; *Levy* v. *Sale*, 37 L. T. 709; *Clarke* v. *Bickers*, 14 Sim. 639. And this is so even though the covenant be contained in a demise to two as tenants in common: *White* v. *Tyndall*, *ubi supra*. But where, in an agreement for the sale of letters patent, it was agreed that the assignment should contain a covenant by the vendors that all the letters patent were valid, and in nowise void or voidable, it was held by the Court of Appeal, reversing the decision of Cozens-Hardy, J., that the assignment should contain joint and several covenants by the vendors that the letters patent were valid and in nowise void or voidable, and that, one of the vendors having died, the relief against his personal representative was rightly claimed on that footing: *National Society, &c.* v. *Gibbs*, [1900] 2 Ch. 280. As to whether the interest in a joint contract passes to the executor, see p. 1512.

(*f*) *Hamond* v. *Jethro*, 2 Brownl. & Gold. 99. See also *Calder* v. *Rutherford*, 2 Brod. & Bing. 302; *Slater* v. *Wheeler*, 9 Sim. 156.

(*g*) *Osborne* v. *Crosbern*, 1 Sid. 238. See also *Towers* v. *Moor*, 2 Vern. 99; *Richardson* v. *Horton*, 6 Beav. 185.

issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death (*h*).

finding of the issues of fact and the judgment.

If a testator, *sole* defendant, die *after* judgment, then by the common law the plaintiff could issue execution against the goods of the testator without any order, if the judgment were recovered within a year before his death (*i*). But now, by Ord. XLII. r. 23, if any change has taken place by death in the parties liable to execution, leave must be obtained to issue execution (*k*) against the goods of the testator. This order must, it would seem, be obtained on notice to the executor (*l*).

Where testator a sole defendant dies after judgment.

An order giving leave to issue execution is not equivalent to a judgment against the executor. It dispenses with the necessity of a judgment against him, and enables the person alleging himself to be entitled to execution to issue execution against the executor without it. Consequently such an order does not satisfy the requirements of sub-sects. 14 and 15 of 1 & 2 Vict. c. 110, so as to enable a charging order to be made against the executor of a deceased judgment debtor, but the creditor must bring an administration action (*m*).

If one of *several* defendants on a joint cause of action die *before* judgment, then it would seem that in a personal action the estate of the dead man is discharged from liability (*n*), for

Where one of several defendants dies before judgment.

(*h*) See *post*, p. 1370.

(*i*) *Wheatley* v. *Lane*, 1 Saund. 285.

(*k*) Equitable execution is not "execution" within the meaning of this rule. What is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Assuming, therefore, that execution at law can be issued against the estate of a deceased person without any leave of the Court (as to which *quære*) a receiver by way of equitable execution cannot be appointed of the estate in the absence of the persons on whom the estate has devolved: *Norburn* v. *Norburn*, [1894] 1 Q. B. 448. Ord. XVII. r. 1, does not keep an action alive as against the estate of a deceased party unless the estate has devolved on some one who is a party to the action; *Re Shephard*, 43 C. D. 131.

(*l*) *Re Shephard*, *ubi supra*.

(*m*) *Stewart* v. *Rhodes*, [1900] 1 Ch. 386, and see *ante*, p. 665, n. (*m*).

(*n*) By sect. 136 of the Common Law Procedure Act, 1852, it was enacted that: "If there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being

if two enter into a joint bond, and one die at any time before judgment, the survivor shall be charged alone (*o*). And if one of two defendants dies after judgment, and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone (*p*): So a release given by the obligee to the representatives of the deceased obligor is no answer to an action against the survivor (*q*).

Where one of several defendants dies after judgment.

And if one of *several* defendants on a joint cause of action die *after* judgment, it would seem that Ord. XLII. r. 23 (R. S. C. 1883), will not, except as against the land of the deceased (*r*), apply, because, as we have seen, if one of two defendants die after judgment and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone.

Where one of several defendants dies between verdict or finding of the issues and judgment.

And in the same way, although it is provided by Ord. XVII. r. 1 (R. S. C. 1883), that whether the cause of action survive or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but that the judgment may in such a case be entered notwithstanding the death, so that if one of two or more defendants dies between verdict and judgment, judgment may be entered on taking the proper steps under Ord. XVII. r. 2 and r. 4, against the deceased defendant, even though the cause of action fall within the rule *actio personalis moritur cum personâ*, yet it would seem that, if the cause of action be joint, there is nothing in this Order to enable the action to continue against any other than the surviving defendant.

suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants." And now it would seem that in such a case the action would by virtue of Ord. XVII. r. 1, proceed as against the defendant on whom the whole liability had devolved by survivorship without the necessity of obtaining any order.

(*o*) *Lampton* v. *Collingwood*, 4 Mod. 315.

(*p*) If he takes out execution upon the real lien, the charge must be equally against the survivor and the real representative of the deceased; for though a personal execution survives, a real does not: *Sir W. Harbert's Case*, 3 Co. 14, *a*; 2 Saund. 51, note (4) to *Trethewy* v. *Ackland*.

(*q*) *Ashbee* v. *Pidduck*, 1 M. & W. 564.

(*r*) If it is sought to have execution against the land of a deceased judgment debtor on a joint cause of action, leave to issue an *elegit* must be obtained, it would seem, on notice to the heir. See Ord. XLII. r. 23.

If the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action (*s*): and, before the Judicature Acts, he could not be sued jointly with the survivor, because one is to be charged *de bonis testatoris* the other *de bonis propriis* (*t*). It has, however, been suggested, that the rule is different since the Judicature Acts (*u*). The following statement is to be found in Lindley on Partnership, 6th edit., at pp. 297, 298: "Before the Judicature Acts, when a partner died in the lifetime of any one or more of his co-partners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death, must have been brought by or against the surviving members of the firm, and by or against them alone; for the representatives of the deceased partner could neither sue nor be sued at law in respect of such a contract. So an action for the conversion of partnership goods must have been brought by the surviving partners. It followed, from the above rule, that the last surviving partner, or if he was dead his legal personal representative, was the proper person to sue and be sued at law in respect of the debts and engagements of the firm. These rules, however, can be no longer relied upon, except where the obligation sought to be enforced is purely joint in equity as well as at law. In other cases (*x*) an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner" (*y*).

(*s*) *May* v. *Woodward*, 1 Freem. 248. As to what words will constitute a joint and several bond, see *Tipping* v. *Coates*, 18 Beav. 401; *White* v. *Tyndall*, 13 A. C. 263. There is in the case of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors not only as against him, but as against all the rest. See *per* Bowen, L. J., in *Re Hodgson*, 31 C. D. 177, 188. See also *Kendall* v. *Hamilton*, 4 A. C. 504; *McLeod* v. *Power*, [1898] 2 Ch. 295.

(*t*) *Hall* v. *Huffam*, 2 Lev. 228.

(*u*) See Lindley on Partnership, 6th edit. p. 297; *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504; and in this respect *Hall* v. *Huffam*, 2 Lev. 188 and 228, *alias Hall* v. *Rougham*, 3 Keble, 798, would seem to be no longer law.

(*x*) As to which, see Partnership Act, 1890, sects. 9 and 12.

(*y*) In support of this last sentence reference is made to R. S. C. Ord. XVI. rr. 1, 4, 6, 8. Ord. XVI.

No change has been made in the law which forbade the joinder of distinct claims by or against several persons, and which required each such separate claim to be made the subject of a separate action (*z*). Ord. XVI. and the rules under it do not alter the liabilities of defendants, and therefore no one defendant can now be made "jointly, severally, or in the alternative," liable for any damages to which he would not have been previously liable, and the only judgment which previously could have been recovered against joint wrongdoers was for the amount to which each and every defendant was liable with the others (*a*). But there are cases where the connecting link and common source of grievance have been held to justify the joinder of several defendants in what is regarded as in substance a single cause of action (*b*).

In a joint action where joint liability is established the liability of the parties may be differentiated in point of time (*c*). This was the established Chancery practice. So in an action against partners for encroachment on a mine, the cause of action continuing, if one of the partners died, his estate would only be accountable for the actual profits received up to his death, while the liability of the surviving partners would be quite different, and might continue till a later date (*d*).

r. 4, provides that, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

(*z*) *Smurthwaite* v. *Hannay*, [1894] A. C. 494; *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450.

(*a*) *Per* FitzGibbon, L. J., in *Dawson* v. *McClelland*, [1899] 2 I. R. 486, 498.

(*b*) *Frankenburg* v. *The Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, where it was contended for the executors of the deceased director that the cause of action against them was different from the causes of action against the other defendants, and that they were liable only to the extent to which their testator's estate had benefited by the fraud. But the Court of Appeal held that the substantial cause of action was the issuing of the prospectus, and that there was no ground for striking out any of the defendants. See, further, the observations of Kenny, J., in *O'Keeffe* v. *Walsh*, [1903] 2 Ir. R. 681, 728.

(*c*) *O'Keeffe* v. *Walsh*, *ubi supra*.

(*d*) *Per* Gibson, J., *ibid.*, p. 717. Under Ord. XXXVI. r. 58, of R. S. C., where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment. See Ann. Prac.

Liability in equity of executor of deceased joint contractor.

With regard to the liability in equity of the executor of the deceased joint contractor, it is completely settled that in the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executors is extinguished (inasmuch as a partnership contract is joint), yet they may be sued in equity (*e*). And after much contention it is now settled that the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner (*f*). Thus, in *Kendall* v. *Hamil-*

(*e*) *Vulliamy* v. *Noble*, 3 Meriv. 619; *Winter* v. *Innes*, 4 My. & Cr. 109. See *Holme* v. *Hammond*, L. R. 7 Ex. 218. This rule is applicable to the case of the death of one of two executors carrying on their testator's trade, in that character, and in the ordinary course of the business accepting a bill of exchange describing themselves simply as executors of their testator: *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24, in which case the estate of the deceased executor was held liable. It is to be observed that in cases of joint contracts there is no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *inter mercatores jus accrescendi locum non habet* applied: *per* Lord Blackburn, *Kendall* v. *Hamilton*, 4 A. C. 504, 545.

(*f*) *Devaynes* v. *Noble*, 1 Meriv. 530; *Wilkinson* v. *Henderson*, 1 M. & K. 582. The surviving partners are necessary parties to a creditor's suit against the assets of the deceased: *Hills* v. *McRae*, 9 Hare, 297. In *Brown* v. *Gordon*, 16 Beav. 310, Romilly, M. R., said, that the debt though gone at law, remains due in equity, because equity considers it to be unjust that where two or more persons are jointly liable, the death of one should throw the whole debt on the others, and exonerate his estate. In *Ridgway* v. *Clare*, 19 Beav. 111, the same learned judge took occasion to express his opinion as to the mode in which the Court administers assets in cases of this description as follows, viz.: Where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner:——If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share:——If both the deceased and surviving partners are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satis-

ton (*g*), Cotton, L. J., in pronouncing the judgment of the Court, says: "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor."

Again, in *Re Hodgson* (*h*), it was held that a creditor of a partnership firm, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and the surviving partner, and that it makes no difference which remedy he pursues first.

Nor will the first creditor be precluded from resorting to the assets of the deceased partner by having in the first instance obtained judgment against the surviving partners (*i*).

Liability of partners.

Now by sect. 9 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is provided that:—"Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

The equitable remedy extends to every joint contract for a loan of money giving to the creditor the benefit of the security of several persons, without any distinction that the debt must be a

fied:——If both parties die before administration takes place, the rule is the same. See also *Lodge* v. *Pritchard*, 4 Giff. 294; 1 De G. J. & S. 610. The Court of Chancery enforces the remedies against the estate of a deceased partner subject to two conditions. In the first place it requires that partnership debts shall be postponed to the separate debts, and that upon a very apparent ground; for it is obvious that inasmuch as the partnership debts are paid first from the partnership estate before anything can flow from the partnership estate to the separate estate of the deceased partner, it is not unreasonable by contrast that the partnership debts should be postponed to the separate debts. The second condition is that the Court requires the presence of the surviving partner in some method, shape or manner at the taking of the accounts of the partnership: *per* Fry, L. J., *Re Hodgson*, 31 C. D. 177, 192.

(*g*) 3 C. P. D. 403, 407.

(*h*) 31 C. D. 177; *supra*, n. (*f*).

(*i*) *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24; *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

mercantile debt incurred by joint traders: Thus, in *Thorpe* v. *Jackson* (*k*), where four persons had opened a joint account with certain bankers, who advanced them money on such joint account, Alderson, B., held, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency (*l*).

Although this interposition of Courts of Equity with regard to partnership debts on the death of a member of a partnership has led to the expression that partnership debts in the eye of a Court of Equity are joint and several, this does not mean that a Court of Equity altered or changed a legal contract, but merely that the Court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on (*m*).

At one time there seems to have been a tendency in Courts of Equity to treat partnership debts as being joint and several irrespective of death and the necessity for the purpose of administration of excluding the doctrine of survivorship. Thus, Sir William Grant, after stating that it has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors, and that when the obligation exists only by virtue of the covenant the extent of the obligation can be measured only by the words in which it is conceived, goes on to say that in the case of a partnership debt all the partners have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured (*n*).

Cases in which equity will treat a joint obligation several.

But although a partnership liability will not generally be treated as joint and several in equity, apart from administration, yet there are cases in which a Court of Equity will treat a joint obligation as several, and the true doctrine on the subject of obtaining relief in equity by considering joint contracts as

(*k*) 2 Y. & Coll. 553.

(*l*) But see *Slater* v. *Wheeler*, 9 Sim. 157; *Other* v. *Iveson*, 3 Drew. 177, 181, 182.

(*m*) *Kendall* v. *Hamilton*, 4 A. C. 504, 517, *per* Lord Cairns, L. C.

(*n*) *Sumner* v. *Powell*, 2 Meriv. 37; 1 Turn. & R. 423.

several, appears to be, that wherever a Court of Equity sees that in a contract joint in form, the real intention of the parties was, that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has, in equity, been considered as several (*o*). Thus a joint bond has, in equity, been considered as several, where there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the words in which it is conceived; and a Court of Equity cannot give the instrument any other than its legal effect (*p*). Accordingly, where a joint promissory note, signed "J. and J. Ewing—James Parr, *surety*," was given to a creditor of the firm of John and James Ewing, and James Parr died, John and James Ewing being both alive, one of whom afterwards became bankrupt, and the other insolvent; it was held that the promissory note could not be considered as several, against James Parr the surety (*q*). So where A. and B. were obligors in a joint bond, and A., who was alleged to be the principal debtor, died; it was held that his assets were not, in equity, liable upon the bond, but that the liability survived to B. (*r*). Again, where premises had been demised to A. and B., who were co-partners, upon which they carried on their partnership business, and A. died during the lease, and, after his death, his executors carried on the business in co-partnership with B. on the premises: it was held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered in equity as several as well as joint, so as to make A.'s estate liable for breaches of the covenant which occurred after his death (*s*). On the other hand, the Court of Appeal, in

(*o*) *Primrose* v. *Bromley*, 1 Atk. 90; *Bishop* v. *Church*, 2 Ves. Sen. 100, 371; *Hoare* v. *Contencin*, 1 Bro. Ch. C. 27; *Thomas* v. *Frazer*, 3 Ves. 399; *Burn* v. *Burn*, 3 Ves. 573; *Ex parte Kendall*, 17 Ves. 525; *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24, *ante*, p. 1373, note (*e*); and cf. *National Society, &c.* v. *Gibbs*, [1900] 2 Ch. 280, *ante*. p. 1368, n. (*e*).

(*p*) *Sumner* v. *Powell*, 2 Meriv. 30; *S. C.*, affirmed, 1 Turn. & R. 423; *Richardson* v. *Horton*, 6 Beav. 185; *Wilmer* v. *Currey*, 2 De G. & Sm. 347. See also *White* v. *Tyndall*, 13 A. C. 263.

(*q*) *Rawstone* v. *Parr*, 3 Russ. 424, 539; *Other* v. *Iveson*, 3 Drew. 177.

(*r*) *Richardson* v. *Horton*, 6 Beav. 185.

(*s*) *Clarke* v. *Bickers*, 14 Sim. 639. See also *White* v. *Tyndall*,

the case of *Beresford* v. *Browning* (*t*), construed a contract, relating to payment and indemnity to a retiring partner, which was joint in form, as several, on the ground that the circumstances under which the contract was entered into, showed that there was a joint and several liability independently of the contract, and, therefore, an intention that the continuing partners should be severally liable.

It being now settled, beyond dispute, that the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors, a further question remains to be considered, viz., when and by what means that liability is to terminate. It seems clear that the deceased partner's estate must continue liable until the debts, which affected him at the time of his death, are, in some way, fully discharged (*u*). The discharge, however, may take place in various ways; not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt (*x*): Or there may be an equitable bar to the remedy; for as the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand (*y*). But the estate of the deceased partner is not discharged by the mere circumstance that the creditor, knowing of the death, continues his transactions with the surviving partners, and forbears for several years, at their request, to take any steps to enforce

ubi supra. As to the nature of the liability of partners see Lindley on Partnership, 6th edit. p. 202 *et seq.*

(*t*) 1 C. D. 30; cf. *Wilmer* v. *Currey*, 2 De G. & Sm. 347, where it was held on the facts that the deed imported a new liability.

(*u*) *Vulliamy* v. *Noble*, 3 Meriv. 619.

(*x*) *Thompson* v. *Percival*, 5 B. & Ad. 925; *Winter* v. *Innes*, 4 My. & Cr. 110; *Brown* v. *Gordon*, 16 Beav. 302. See also *Lee* v. *Flood*, 2 Sm. & G. 250; *Blair* v. *Bromley*, 5 Hare, 555, *per* Wigram, V.-C., *Lyth* v. *Ault*, 7 Exch. 669; *Bilborough* v. *Holmes*, 5 C. D. 255. As to discharge by proof, where there is no *locus pœnitentiæ*, against the estate of the continuing parties in bankruptcy, see *Scarf v. Jardine*, 7 A. C. 345. See also *Simpson* v. *Henning*, L. R. 10 Q. B. 406, as to the effect of the receipt of a composition on the joint debt.

(*y*) *Ex parte Kendall*, 17 Ves. 526, by Lord Eldon.

payment of his debt (*z*): nor by his receipt of interest from them and a new partner (*a*).

Right to enforce contribution.

With respect to the right of a surviving co-contractor to enforce contribution from the personal representatives of his deceased companion: although it cannot be stated as a universal proposition that in all cases where two or more jointly employ a third person, there is an implied undertaking in all to contribute rateably *inter se*, so as to bind the executors of a deceased co-contractor; yet if several persons jointly contract for a chattel, to be made or procured for the common benefit of all (for instance the building of a ship or the furnishing of a house), *and as to which the executors of any party, dying before the work is completed, are by agreement to stand in the place of the party dying;* in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased co-contractor, that his executors should contribute his proportion of the price of the article to be furnished (*b*).

Provisions of the Partnership Act, 1890 (53 & 54 Vict. c. 39).

Besides the sections already cited the following sections of the Partnership Act, 1890 (53 & 54 Vict. c. 39), seem to be those which affect the duties and liabilities of executors:

Dissolution by death or bankruptcy.

Sect. 33 (1). "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

Liability of estate of partner for partnership debts contracted after death of partner.

Sect. 36 (3). "The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

(*z*) *Winter* v. *Innes*, 4 My. & Cr. 101.

(*a*) *Harris* v. *Farwell*, 13 Beav. 403. By sect. 14 (2) of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is provided that "Where after a partner's death, the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death." And see *Webster* v. *Webster*, 3 Swanst. 490. For other cases relating to these doctrines, see Lindley on Partnership, 6th edit. pp. 74, 621.

(*b*) *Prior* v. *Henbrow*, 8 M. & W. 873. See also *Batard* v. *Hawes*, 2 E. & B. 287, 298, *post*, p. 1414, note (*j*), where the Court seemed to think the executors liable without any special agreement.

Rights of partners as to application of partnership property.

Sect. 39. "On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

Right of outgoing partner in certain cases to share profits made after dissolution.

Sect. 42. (1). "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets."

(2). "Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

Retiring or deceased partner's share to be a debt.

Sect. 43. "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

Liabilities of executors as such of deceased shareholders in public companies.

With respect to the liabilities of the executors of shareholders in public companies, it is important to notice the provisions of the Companies Act, 1862. The following are the chief sections of that Act which are material in this connection:—

Companies Act, 1862.

Sect. 16. ". . . All moneys payable by any member to the

25 & 26 Vict. c. 89.

company, in pursuance of the conditions and regulations of the company, or any of such conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt" (*c*).

Nature of liability of contributory.

Sect. 75. "The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland) of the nature of a specialty, accruing due from such person at the time when his liability commenced (*d*), but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls as well as calls already made."

Contributories in case of death.

Sect. 76. "If any contributory dies, either before or after he has been placed on the list of contributories hereinafter mentioned (see sect. 98), his personal representatives, heirs, and devisees (*e*) shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly" (*f*).

(*c*) See *Buck* v. *Robson*, L. R. 10 Eq. 629; *Re Muggeridge*, *ibid.* 443.

(*d*) See *Re Muggeridge*, L. R. 10 Eq. 443.

(*e*) It follows that under 3 & 4 Will. IV. c. 104, the real estate of the deceased is chargeable with calls made as well after as before the deceased's death: *Turquand* v. *Kirby*, L. R. 4 Eq. 123; *Hamer's Devisees' Case*, 2 De G. M. & G. 366. There is no distinction between the dead shareholder's estate and the living shareholders' as to the extent and measure of liability: *Baird's Case*, L. R. 5 Ch. 725.

(*f*) Although the liability is *primâ facie* a liability of the deceased's estate and not of his personal representatives personally, unless they have by their acts made themselves liable as shareholders; yet where executors paid a legacy without providing for any contingent liability in respect of shares which they retained unsold, and the company was subsequently wound up and the executors placed on the list of contributories, it was held that they were liable to pay the amount of the legacy in satisfaction of calls: *Taylor* v. *Taylor*, L. R. 10 Eq. 477. As to the right of the executors to be indemnified by the legatees, see *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; and *Whittaker* v. *Kershaw*, 45 C. D. 320. Where shares are registered in the joint names of two or more persons in the absence of any provision in the articles to the contrary a joint liability only is created, which will survive on the death of one to the others: *Hill's Case*,

Sect. 99. "In settling the list of contributories the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the Court thinks fit."

Provision as to representative contributories.

Sect. 105. "If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory or either of such estates, and of compelling payment thereout of the moneys due."

Provision in case of representative contributory not paying moneys ordered.

Unless by the Articles of Association the regulations of Table A. are excluded the following articles relating to the transmission of shares and the liabilities thereon will apply:—

Art. 12. "The executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to his share" (*g*).

Shares devolving by death.

Art. 13. "Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company."

Persons entitled by death, bankruptcy or marriage.

Besides the liability of the estate of a deceased shareholder in respect of shares, the executor or administrator may make himself personally liable in respect of the same. An executor whose testator has held shares in a joint-stock company has

Personal liability of executor besides liability of the estate.

L. R. 20 Eq. 585, 595, a case decided under sect. 7 of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), which is similar to sect. 16 of the Companies Act, 1862 (25 & 26 Vict. c. 89).

(*g*) The death of a shareholder makes not the slightest difference either in right or liability; the executor of a deceased shareholder who succeeds in point of property takes it (of course in his character as executor) on exactly the same terms and conditions as every other owner of the share, with equal benefits and equal liability. The dead shareholder remains, that is, his estate remains, a member of the association: *Baird's Case*, L. R. 5 Ch. 725; *Blakeley's Case*, 3 Mac. & G. 726; 13 Beav. 133; *Gouthwaite's Case*, 3 Mac. & G. 187; *Keen's Executor's Case*, 3 De G. M. & G. 272; *Heward* v. *Wheatley*, *ibid.* 628. See also *Re Herefordshire Bank*, 33 Beav. 435; *Re Leeds Banking Co.*, L. R. 1 Ch. 231.

generally one of two courses open to him. He may have the shares transferred into his own name and become to all intents and purposes a member of the company (*h*). He may, on the other hand, not wish to have the shares transferred into his own name, and he ought in that case to have a reasonable time allowed him to sell the shares and to produce a purchaser who will take a transfer of them (*i*).

It is quite open to an executor, as appears from Lord Selborne's language in *Buchan's Case* (*k*), to notify simply to the company, in which the testator was a shareholder, that he is the executor, and that alone would not authorize the company to put the name of the executor upon the register of shareholders in such a way as to make him personally liable: But where, upon the amalgamation of two banking companies, a shareholder had the option of exchanging his shares in the one bank for shares in the other, which was taking over the business of the former, and did not exercise the option but his executors did, and a certificate was made out to them individually but describing them as executors, they were held liable although the bank subsequently at their request cancelled the certificate in their names and made one out in the name of the testator. For if shares are once put into the names of executors individually, although offered to and accepted by them in a representative capacity, they cannot say that their liability is to be only a liability to the extent of the assets of the testator (*l*).

The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. Trustees have not, in any proper sense of the word, a representative character, but executors have; and it is impossible that they should not be entitled to produce legal evidence of their representative rights to the

(*h*) In *Spence's Case*, 17 Beav. 203, it was held that executors, who, after the death of their testator, had purchased further shares, were contributories without qualification in respect of them, though they had been treated as executors in regard to such further shares. See also *Re Leeds Banking Co.*, L. R. 1 Ch. 231; *Jackson* v. *Turquand*, L. R. 4 H. L. 305.

(*i*) *Buchan's Case*, 4 A. C. 549, 588, *per* Lord Cairns, L. C.

(*k*) 4 A. C. 549.

(*l*) *Re Cheshire Banking Co., Duff's Executors' Case*, 32 C. D. 301.

company, for the purpose of having their title in some way recorded and recognized, without making themselves personally liable (*m*).

Companies Clauses Consolidation Act, 1845, 8 Vict. c. 16.

The Companies Clauses Consolidation Act, 1845, contains different provisions from those of the Companies Act, 1862, with regard to the procedure in the case of the decease of a shareholder in a company governed by the former Act. Under sect. 18, the secretary, on receipt of the declaration required by that section, is obliged to enter in the register the name of the person entitled by transmission to the shares of the deceased member. When an executor finds that his testator has died entitled to shares in such a company, he may do one of two things. He may leave the shares alone outstanding in the name of the testator: the consequence would be that he could neither transfer the shares, nor vote in respect of them, nor receive dividends on them, and, though he might be liable for calls, it would only be in his representative capacity. On the other hand, the executor may want to deal with the shares, or to receive dividends in respect of them. If so, he must avail himself of the machinery given by the 18th section, and procure himself to be registered as a shareholder. Once registered under it, executors clearly become shareholders, the company having nothing to do with the character in which they hold the shares, whether as executors or trustees (*n*).

The liability of an executor, so long as he has not himself become a shareholder, is limited to the extent of the assets in his hands properly administered. If, however, he is guilty of a *devastavit*, he will be held liable to the extent of the *devastavit* to pay moneys due either before or after the death of the testator on the shares of the testator still standing in the testator's name (*o*).

(*m*) *Buchan's Case*, 4 A. C. 549, 595, *per* Lord Selborne; but see the observations of Lord Esher, M. R., in *Barton* v. *London & North-Western Rail. Co.*, *ubi supra*, as to the meaning of Lord Selborne being restricted to recording the title of the executors with a view to registering a purchaser from them of the shares, without being registered as shareholders themselves.

(*n*) *Per* Lindley, L. J., in *Barton* v. *London & North-Western Rail. Co.*, 24 C. D. 77, 88. Under sect. 20 of the Act of 1845, the company is not bound to regard trusts.

(*o*) *Taylor* v. *Taylor*, L. R. 10 Eq. 477. As to the liability of an executor where a release given to a testator by a company had been set aside, see *Re Bewley*, 24 L. T. N. S. 177; 19 W. R. 464.

Covenants concerning the realty:

In every case, where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator (*p*); that is, unless it is such a covenant as was to be performed by the person of the testator (*q*). Thus, in *Thursden* v. *Warthen* (*r*), a lord of a manor covenanted for himself, his heirs, and executors, within seven years to convey, upon request, a copyhold to the plaintiff for life, *secundum consuetudinem manerii:* The covenantor died, and the plaintiff requested his executor to convey the copyhold, which he refused; and thereupon, the plaintiff brought an action of covenant against the executor: It was objected, that the declaration did not show what estate the covenantor had in the manor, and therefore it should be intended to be a fee-simple, and if so, then the request ought to have been made to him who was to make the estate, and this was the heir; for the executor could not possibly perform the covenant, and so no breach by him: But Coke, C. J., said, that the request made to the executor was good; because executors represent the person of the testator as to the performance of covenants to be in covenant performed: And to this the whole Court (except Houghton, J.) agreed; and judgment was given for the plaintiff.

So in the case of *Macartney* v. *Blundell* (*s*), in Dom. Proc., the appellant claimed the renewal of a lease, pursuant to a covenant, against the heirs of the covenantor: They refused, alleging that the covenantor was bare tenant for life: And it was holden, that this refusal was a breach of the covenant, for which an action could be maintained at law against his representatives.

The executor is not only liable upon all covenants by the testator which have been broken in his lifetime (*t*), but, moreover, he is answerable for all breaches in his own time, as far as he has assets: For the privity of contract of the testator is not determined by his death (*u*). Thus, if a tenant in tail leases for years, and dies, and the issue in tail ousts the termor, he

(*p*) Bro. Covenant, pl. 12; Com. Dig. Covenant (C. 1).

(*q*) *Hyde* v. *Dean of Windsor*, Cro. Eliz. 553; *Bally* v. *Wells*, 3 Wils. 29.

(*r*) 2 Bulstr. 158.

(*s*) 2 Ridgw. P. C. 113.

(*t*) Wentw. Off. Ex. 251, 14th edit.

(*u*) *Coghill* v. *Freelove*, 3 Mod. 326.

shall have covenanted against the executors, upon an express covenant for quiet enjoyment (*x*).

liability of executor of landlord and tenant:

Although a covenant in a lease should be of a nature such as to run with the land, so as to make the assignee of the term liable for a breach of it after the assignment, yet this will not discharge the executor of the original lessee from a concurrent liability on the covenant, as far as he has assets, even although the lessor shall have accepted the assignee as his tenant.

in covenant:

So the assignee of the reversion, by virtue of the stat. 32 Hen. VIII. c. 34, may maintain an action of covenant against the executor of the lessee upon an express covenant (*y*).

So if the executor himself assigns the term, the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant: And so also may the assignee of the reversion (*z*).

Hence an executor, when he carries a lease to market, has a right to require that the purchaser shall covenant for indemnity against the payment of rent and performance of

(*x*) F. N. B. 145 (E), note (*a*). As to powers now of tenant in tail to lease, see Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 58.

(*y*) *Brett* v. *Cumberland*, Cro. Jac. 521, 522; 1 Saund. 241, *a*, note (5), to *Thursby* v. *Plant*. But although the executor of the *original lessee* will be liable for breaches of covenant, incurred after an assignment by the testator or by himself, it is otherwise where the testator was the *assignee of the lease;* for no action will lie against him except in respect of breaches in his own time: and therefore, all future liability may be discharged by assignment over, even to a pauper: *Taylor* v. *Shum*, 1 B. & P. 21. And since such a course is quite justifiable, morally as well as legally, after an offer to surrender the lease to the landlord, the executor may be guilty of a *devastavit* in neglecting to adopt it: *Rowley* v. *Adams*, 4 My. & Cr. 534.

(*z*) *Hellier* v. *Casbard*, 1 Sid. 266; *Coghill* v. *Freelove*, 3 Mod. 325. But see stat. 22 & 23 Vict. c. 35, s. 27, *ante*, p. 1080, by which an executor or administrator liable to a covenant in a lease or agreement for a lease granted or assigned to the testator or intestate, after satisfying all liabilities already accrued due, and setting apart a sufficient fund to answer any future claims that may be made in respect of any fixed or ascertained sum covenanted by the lessee to be laid out on the property, may assign the lease to a purchaser and distribute the residuary personal estate of the deceased without appropriating any part to meet any future liability under the lease. When the executor has done this he has freed himself from all personal liability in respect of any subsequent claim. This is, however, without prejudice to the lessor's right to follow the assets of the deceased.

covenants, notwithstanding the executor himself is not bound to enter into a covenant for the title, but only that he has done no act to incumber (*a*).

It must be observed, however, that there is a distinction, with respect to this liability, between an express covenant and a mere covenant *in law:* For no action lies against an executor or administrator upon a covenant in law, which is not broken till after the death of the testator. Accordingly, in the case of *Adams* v. *Gibney* (*b*), a tenant for life, remainder over, demised to the lessee, his executors, &c., for the term of fifteen years, *without any express covenant for quiet enjoyment:* The lessee was evicted by the remainderman, after the death of the tenant for life, but before the expiration of the fifteen years: And the Court of Common Pleas held, that the lessee could not maintain an action of covenant against the executor of the tenant for life, in respect of such eviction, although it was admitted that the word "demise" in the lease imported and made a covenant *in law* for quiet enjoyment by the lessee during the continuance of the estate out of which the lease was granted.

With regard to leases made after the 31st day of December, 1881, the Conveyancing and Law of Property Act, 1881, provides as follows:—

Sect. 10 (1). "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and

(*a*) *Staines* v. *Morris*, 1 Ves. & B. 8; *Wilkins* v. *Fry*, 1 Meriv. 265, 266. Even if there be no such covenant, yet, if the lessor proceeds against the executor, and recovers damages for a breach of the covenant after the assignment, the executor may have an action on the case, or *assumpsit*, against the assignee for having neglected to perform the covenant, whereby the executor sustained damage: *Burnett* v. *Lynch*, 5 B. & C. 589; *Marzetti* v. *Williams*, 1 B. & Ad. 424, by Lord Tenterden; *Moule* v. *Garrett*, L. R. 5 Exch. 132; affd. in Exch. Ch. L. R. 7 Exch. 101. But this liability in the assignee continues no longer than his interest as such: *Wolveridge* v. *Steward*, 1 Cr. & M. 644; *Humble* v. *Langston*, 7 M. & W. 530; *Rowley* v. *Adams*, 4 My. & Cr. 540; though, perhaps, the executor has the same remedy against each subsequent assignee in respect of the breaches committed during the continuance of the interest of each: *Wolveridge* v. *Steward*, 1 Cr. & M. 660. As to the construction of the covenant entered into by the assignee of leaseholds, see *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173.

(*b*) 6 Bing. 656. See also *Williams* v. *Burrell*, 1 C. B. 402, as to what shall constitute an implied or an express covenant within the meaning of this rule.

other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

Sect. 11 (1). "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

in debt:

With respect to the liability of the executor of the lessee to an action of *debt* for rent accrued after the death of the testator, it is fully established, that the executor will be liable as long as the lease continues, and as far as he has assets, as well in that form of action as in covenant, notwithstanding the lessee assigned the term before his death, or the executor has done so since (*c*). But if the lessor has *accepted the assignee as his tenant*, then no action of debt will lie against the executor for rent accrued since the assignment, although, as it just appeared, an

(*c*) It is true that Lord Coke, in *Walker's Case*, 3 Co. 24, *a*, says, that "it was adjudged in *Overton* v. *Sydhall*, that if the executor of a lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined." But this is contrary to all the subsequent authorities. See *Coghill* v. *Freelove*, 3 Mod. 325; *Pitcher* v. *Tovey*, 4 Mod. 76; 1 Saund. 241, *b*, note (5).

action of covenant may be maintained on an express covenant for its payment during the continuance of the lease.

personal liability of executor for rent accrued after testator's death:

This may be the proper place to consider more fully a subject which has been already partially discussed (*d*), viz., the personal responsibility of the executor for the rent incurred under a demise to his testator.

If the whole rent accrued in the lifetime of the testator, the action to recover it from the executor must be brought against him in his representative character: and therefore, if the form of action be in debt, it must be in the *detinet* only, and not in the *debet* and *detinet;* and the judgment must be *de bonis testatoris* (*e*).

But in an action of debt for rent incurred after the death of the lessee, *if the executor enters* upon the demised premises, the lessor has his election, either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits (*f*). Therefore, if the action be brought in debt, the lessor may either sue the defendant as executor in the *detinet* (*g*), or in the *debet* and *detinet* (*h*), as assignee of the

(*d*) *Ante*, p. 1347. It has been thought better to leave the discussion in the following pages as it appeared in the earlier Editions unaltered except by the addition of new cases, notwithstanding the constant reference to ancient pleading. It seemed impossible to adapt the text to the system of pleading since the Judicature Act without diminishing the authority which the text derives from Sir Edward Vaughan Williams.

(*e*) 1 Roll. Abr. 603 (S), pl. 9; *Fruen* v. *Porter*, 1 Sid. 379.

(*f*) *Boulton* v. *Canon*, 1 Freem. 337; *S.C.*, Pollexf. 125; 1 Saund. 1, note (1) to *Jevens* v. *Harridge*.

(*g*) *Royston* v. *Cordrye*, Aleyn, 42; *Hope* v. *Bague*, 3 East, 2.

(*h*) *Hargrave's Case*, 5 Co. 31; *Rich* v. *Frank*, Cro. Jac. 238; *Caly* v. *Joslin*, Aleyn, 34; 1 Saund. 1, note (1). So if the executor enters, he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died: *The Bailiffs of Ipswich* v. *Martin*, Cro. Jac. 411; *Jevens* v. *Harridge*, 1 Saund. 1. Formerly, if one sum of money was due for arrears of rent which *became due* in the lifetime of the testator, and another sum for arrears due in the executor's own time, the lessor could not in one action charge the executor in the *detinet* for the one part, and in the *debet* and *detinet* for the other; for then two different judgments would be necessary: *Salter* v. *Codbold*, 3 Lev. 74: but one action might be brought for both sums in the *detinet* only: *Aylmer* v. *Hide*, 13 Geo. II.; B. R. M. S. Selw. N. P. 610, 6th edit. But now, under Ord. XVIII. r. 5, "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to

term (*i*). So, in covenant, the lessor has his election, either to charge the executor as executor (*k*), or as assignee, without naming him executor, stating generally in the declaration that the estate of the lessee in the premises lawfully came to the defendant (*l*).

If the executor does not enter (*m*), he is still chargeable as

arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator." See *post*, p. 1571.

(*i*) In such cases it appears to have been the practice to name the defendant executor, and to state in the declaration, in the *debet* and *detinet*, the demise to the deceased, his death, the grant of administration to the defendant, his entry into the demised premises, and the subsequent accruing of rent: See the entry in *Jevens* v. *Harridge*, 1 Saund. 1, and the case of *Caly* v. *Joslin*, Aleyn, 34. But it is sufficient to charge the defendant in the *debet* and *detinet* as assignee generally, without naming him executor. See *Lyddall* v. *Dunlapp*, 1 Wils. 4, 5; *Wollaston* v. *Hakewill*, 3 M. & Gr. 297; *infra*, note (*m*).

(*k*) *Buckley* v. *Pirk*, 1 Salk. 317.

(*l*) *Tilney* v. *Norris*, 1 Ld. Raym. 553; *S. C.*, 1 Salk. 309; Carth. 519; *Buckley* v. *Pirk*, 1 Salk. 317; 1 Saund. 1, note (1).

(*m*) Before entry and taking possession, the executor of a lessee cannot be made liable as assignee of the term, but if he does enter and take possession he may be made liable as assignee; yet he may then by proper pleading limit his liability for rent to the yearly value the premises might have yielded, though it would seem he cannot so limit his liability in respect of breach of contract to repair: *Rendall* v. *Andreæ*, 61 L. J. Q. B. 630, 633. In this case Mr. Justice A. L. Smith adopted the view indicated by Sir Edward Vaughan Williams in the earlier Editions of this Work, in which the note on this point ran as follows: There seems to be some doubt whether this distinction as to the entry of the executor has not, in a great measure, ceased to exist since the decision of *Williams* v. *Bosanquet*, 1 Brod. & B. 238. That case decided (overruling *Eaton* v. *Jacques*, Dougl. 455), that the assignee, in fact, of a lease may be charged as assignee on a covenant contained in it for the payment of rent, though he has never occupied or actually become possessed. And it does not appear altogether clear whether it is not a consequence that an executor may likewise be charged, as assignee in law, without entry. See the observation of Parke, B., at the conclusion of his judgment in *Nation* v. *Tozer*, 1 Crompt. M. & R. 176; 4 Tyrwh. 565. The point above suggested was much discussed in the C. P., in the case of *Wollaston* v. *Hakewill*, 3 M. & Gr. 297; *S. C.*, 3 Scott, N. R. 593. In that case the plaintiffs declared, as assignees of a lessor, on certain covenants contained in a lease for ninety-nine years, and alleged that all the estate of the lessee, Thomas Stead, of and in a great part of the demised premises, "by assignment thereof then made, came to and vested in the defendant, where-

executor in the *detinet*, because he cannot so waive the term as not to be liable for the rent as far as he has assets (*n*).

Where the executor, having entered, is sued in the *debet* and *detinet*, as assignee, for rent incurred after his entry, he cannot plead *plene administravit* (*o*), even although he be named executor

upon and whereby the defendant became and was possessed of the said part of the said demised premises, and continued so possessed, until the commencement of this suit." And the plaintiffs then proceeded to assign a breach of covenant for the non-payment of certain additional rents reserved by the lease, and also a breach of covenant in not keeping the premises in repair. The defendant, by her plea, traversed "that all the estate, &c., of the said Thomas Stead, of and in the said part of the said premises by assignment thereof made, came to and vested in her, in manner and form, &c.;" upon which issue was joined. After trial and verdict for the plaintiffs, a motion for a nonsuit was made on the ground of an alleged variance between the allegation in the declaration, charging the defendant generally as assignee of the lease, and the proof offered at the trial, whereby she appeared to be only executrix of an assignee, and that she had never entered or taken the profits. But the Court was of opinion that there was no variance. And Tyndal, C. J., in delivering the judgment of the Court, said that, as to the argument that the executor, by being charged generally as assignee, becomes thereby liable *de bonis propriis*, the answer is that he may, by proper pleading, discharge himself from personal liability, by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor by alleging that the term is of no value, and that he has no assets. But that, if instead of relieving himself by pleading, he takes issue on the fact, whether he is assignee or not, the evidence that he is executor proves the affirmative of the issue that he takes the term by assignment. And his Lordship referred to the case of *Green* v. *Lord Listowell*, 2 Ir. L. R. 384, as having determined this precise point. See also *Ackland* v. *Pring*, 2 M. & Gr. 937. And as to an executor *de son tort*, see *Paull* v. *Simpson*, 9 Q. B. 365. This subject was again considered in the case of *Kearsley* v. *Oxley*, 2 Hurl. & C. 896. In that case the declaration charged the defendant as assignee of a lease, and alleged the non-payment of rent. The defendant pleaded that administration *de bonis non* of the lessee was granted to a woman whom he afterwards married, and that neither he nor his wife ever entered into or took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appeared. And it was held that this plea afforded a good answer to the action as an argumentative traverse that the defendant was assignee.

(*n*) *Howse* v. *Webster*, Yelv. 103; *Helier* v. *Casbert*, 1 Lev. 127.

(*o*) *Caly* v. *Joslin*, Aleyn, 34; *Helier* v. *Casbert*, 1 Lev. 127, 128;

in the declaration (*p*): for if the rent be of less value than the land, as the law *primâ facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and therefore the plea of *plene administravit* confesses a misapplication, since no other payment out of the profits can be justified till the rent is answered (*q*). And if judgment be given against the executor, it is *de bonis propriis* (*r*). But if the land be of less value than the rent, the executor may plead the special matter, viz., that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only (*s*). If, however, such a plea be pleaded to the whole rent in the declaration, it will not be a good bar unless it shows that there were no profits at all; because the executor is chargeable personally for so much of the rent as the premises are worth: If, therefore, the profits have been less than the rent, and therefore cover a part only, that part should be confessed and the plea pleaded to the remainder (*t*). In

Sackvill v. *Evans*, Freem. 171; *Buckley* v. *Pirk*, 1 Salk. 317.

(*p*) See *ante*, p. 1388, note (*h*).

(*q*) *Buckley* v. *Pirk*, 1 Salk. 317.

(*r*) Wentw. Off. Ex. 285, 286, 14th edit.; 1 Saund. 1, note (1). So if the executor be sued in *assumpsit* for use and occupation in his own time, he shall be liable *de bonis propriis*, though it be laid that the defendant occupied *as executor*: *Wigley* v. *Ashton*, 3 B. & A. 101. See *Atkins* v. *Humphrey*, 2 C. B. 654.

(*s*) *Billinghurst* v. *Spearman*, 1 Salk. 297; *Buckley* v. *Pirk*, 1 Salk. 317; 1 Saund. 1, note (1). In many instances the profits of the land may be insufficient for a given period, although the lease may, on the whole, be beneficial; as in respect to the rent for the occupation of premises from Michaelmas to Lady-day, especially where almost the whole profit is taken in the summer; as, formerly, in the case of a lease of tithes or of meadow grounds which are usually flooded in the winter: Wentw. Off. Ex. 289, 14th edit. So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent: *ibid.* 290. In these and the like instances, the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* and *detinet*, he must disclose the matter by special pleading: *Buckley* v. *Pirk*, 1 Salk. 317; Toller, 280.

(*t*) *Rubery* v. *Stephens*, 4 B. & Adol. 241, 247. In that case the plaintiff having declared, in cove-

Remnant v. *Bremridge* (*u*), which was an action for use and occupation generally, where it appeared that the defendant, who was the administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet, it having been proved by the defendant, under the general issue, that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action.

In *Re Bowes* (*x*) it was decided that an executor who takes possession of a leasehold of his testator is liable personally, as assign of the lease, for subsequent rent up to the letting value of the holding. And North, J., in delivering judgment says: "The law is, as the cases cited and several others clearly establish, that if an executor is sued as assign of the lease for rent accrued during the time in which he was in possession he is entitled to set up, by way of defence, that he is only assign as executor, and that the profits or yearly value of the property amount only to a sum less than the rent. Then he must pay into Court the amount that he admits to be the full value, and if his plea is proved and that is the full value, he will be under no further liability in respect of the matter." The learned Judge goes on to point out that the full value is not the actual amount received by the executor, but the amount which he might have received by the exercise of reasonable diligence.

nant, for rent at 26*l.* a year, the defendants pleaded that they were only chargeable as executors, and that the term came to them as such; that the premises were of less yearly value than the said rent of 26*l.*, viz., of no value; and that they had fully administered, &c.: The plaintiff replied, that the premises were of the yearly value of 26*l.*, and issue was joined thereon: At the trial the yearly value was found by the jury to be 20*l.*: And the Court of King's Bench held that the replication was, in substance, that the premises were of some value; that the issue was merely informal and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. See also *Hopwood* v. *Whaley*, 6 C. B. 744, where in a similar plea, an averment that the defendant "*did not*" was held, after verdict, to mean that he "*could not*" derive any profit from the demised premises; and it was further held that the plea might be taken distributively, and the plaintiff should recover to the extent to which defendant might, by the exercise of reasonable diligence, have derived profit.

(*u*) 8 Taunt. 191.

(*x*) 37 C. D. 128.

And on the same principle, although, as it has already appeared (*y*), an executor, generally speaking, cannot waive the term, for he must renounce the executorship *in toto*, or not at all; yet, if the value of the land is of less amount than the rent; and there is a deficiency of assets, he may waive such a lease (*z*). And if there are assets to bear the yearly loss for some years, but not during the whole term, then, it seems, the executor must pay the rent as long as the assets will hold out, and must then waive the possession, giving notice to the reversioner (*a*).

But if the executor be sued *as executor*, in debt in the *detinet*, for rent incurred after the death of the testator he may plead *plene administravit:* for that is a good plea, wherever no other judgment can be given but only against the defendant as executor (*b*).

So, where the executor is charged *as executor*, in an action of covenant, for non-payment of rent incurred in the defendant's own time, *plene administravit* is a good plea, although the defendant might have been charged as assignee of the term (*c*).

liability of executor on assignment of lease:

It remains to consider how these points are affected by the assignment of the lease. If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him: but still he will be liable as executor in debt in the *detinet* for the rent, unless the lessor has accepted the assignee as his tenant (*d*); and even

(*y*) See *ante*, p. 516.

(*z*) Wentw. Off. Ex. c. 11, p. 244, c. 12, p. 290, 14th edit.; *Wilkinson* v. *Cawood*, 3 Anstr. 909, by Macdonald, C. B. (cited by Wood, V.-C., 1 K. & J. 575). He must, it would seem, promptly offer to surrender the lease, and this will help him as to subsequent breaches of covenant. See *Reid* v. *Lord Tenterden*, 4 Tyrwh. 118, 120.

(*a*) Wentw. Off. Ex. *ubi supra*.

(*b*) *Lyddall* v. *Dunlapp*, 1 Wils. 5.

(*c*) *Ibid.* 4; *Wilson* v. *Wigg*, 10 East, 315. But if issue be joined upon this plea, and it should be proved that the executor has received any profit from the land, there would, it would seem, be a verdict against him; for he could not legally apply the profits to any other purpose than payment of the rent: Therefore, if the land yields some profit, but less than the rent, the executor ought to plead *plene administravit præter* the profit. This doctrine, however, applies only when the action is brought on a covenant in a lease to pay the rent thereby reserved, and not to a case where the assignor of a lease sues the executor of the assignee on a covenant to perform the covenants in the lease, and to indemnify the assignor for any breach of them, notwithstanding the breach assigned is the non-payment of rent: *Collins* v. *Crouch*, 13 Q. B. 542.

(*d*) *Helier* v. *Casbert*, 1 Lev. 127. See *ante*, p. 1388.

in that case, the executor will be liable *as executor*, in covenant (*e*). If the executor enters, and afterwards himself assigns the lease, then he is chargeable *as assignee*, for that time only during which he occupied (*f*). And if he is sued for rent incurred since the assignment by himself, he is liable in his representative charactor only: Therefore, if the lessor brings an action of covenant against the executor, and charges that after the testator's death, and the proving of the Will by the defendant, the demised premises came by assignment to one A. B., and that such assignee has broken the covenants in the lease, the defendant may plead *plene administravit* (*g*).

personal responsibility of executor for repairs after testator's death:

It must here be observed, that the Court of Common Pleas held, in the case of *Tremeere* v. *Morrison* (*h*), that although, in respect of rent, the personal liability of an executor of a lessee does not exceed the value of the demised premises, yet this qualification does not extend to a covenant for repairs; but that where an executor is sued as assignee on a covenant to repair, he is liable as any other assignee: Accordingly, in that case a plea by the executor that the demised premises had yielded no profit, nor had been of any value whatever, since the testator's death, with the addition of an averment of *plene administravit*, and an offer to surrender before the breaches occurred, was held bad on demurrer (*i*). The principal ground of this decision appears to have been, that the law is clear that an action of waste will lie against an executor for any waste done in his time, as well permissive as voluntary (*k*).

This decision appears to have been to some extent confirmed by the subsequent case in Q. B. of *Hornidge* v. *Wilson* (*l*). That was an action of debt for rent against the defendant as assignee of a term: The defendant pleaded that he was administrator; that the premises were of less value, and had yielded less profit than the arrears of the rent, that is to say, £——; that he had paid over to the plaintiff all the profit he had received, and had fully administered, and had offered to surrender: Replication, that the premises were worth more than the sum in the plea mentioned, and a denial of the surrender: the premises were

(*e*) See *ante*, p. 1388. See *Leigh* v. *Thornton*, 1 B. & A. 625.

(*f*) See *ante*, p. 1385, note (*y*).

(*g*) *Wilson* v. *Wigg*, 10 East, 313.

(*h*) 1 Bing. N. S. 89.

(*i*) But see the observations of Bayley, B., in *Reid* v. *Lord Tenterden*, 4 Tyrwh. 118, 120.

(*k*) See *Ives* v. *Sammes*, 2 Anders, 51; 2 Inst. 302.

(*l*) 11 A. & E. 645.

demised by a party, through whom the plaintiff claimed, to N. for twenty-one years, in 1818, the lease containing a covenant by the lessee to repair: N., in 1827, underlet to E. for twelve years, wanting ten days, at a rent exceeding that reserved in the lease: N. died in 1829, and administration was granted to the defendant in 1830: E. died in 1828, and the premises since that time had been occupied by E.'s sister, who for some years had paid the rent, out of which the plaintiff's rent was paid, but had since become insolvent, and her rent had fallen into arrear: The premises had become out of repair, and had been for some years, at the time of the commencement of the action, of less value than the rent reserved in the original lease; but would be of that value if repaired: The defendant had given the plaintiff notice of his willingness to surrender: And the Court of Queen's Bench held, first, that the proof of non-payment of rent by the under-lessee was no defence to this action, on the issue as to the value of the premises: Secondly, that under the same issue, the defendant could not rely on the premises being out of repair as a ground of defence, being himself bound by the covenant to repair. And in *Sleap* v. *Newman* (*m*), the case of *Tremeere* v. *Morrison* was expressly recognised and acted on by the Court of Common Pleas.

personal liability of executor of tenant from year to year continuing to occupy:

In *Buckworth* v. *Simpson* (*n*), A. demised to B. certain lands and premises for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions, as to the management of the lands and repairing the buildings: The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent: And the Court of Exchequer held, that they were chargeable in their personal character, upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract (*o*).

liability from occupation of co-executor:

If lands are leased for years by demise not under seal, and one of the two executors of the lessee enters into the demised premises, such entry does not enure as the entry of the two

(*m*) 12 C. B. N. S. 116.
(*n*) 1 Cr. M. & R. 834.
(*o*) See *Arden* v. *Sullivan*, 14 Q. B. 832, 840.

executors, so as to make them both liable in an action for use and occupation (*p*).

liability of executor of lessee as to party-walls.

It has been held (*q*), that under the stat. 14 Geo. III. c. 78 (The Building Act), where a party-wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises is liable to contribution out of such rent, though he be owner only as an executor or administrator (*r*).

Liability of executor on a covenant by testator to take a renewed lease.

In *Stephens* v. *Hotham* (*s*), Wood, V.-C., made a decree for specific performance of a covenant in a lease to take a renewed lease against the executors of the lessee, who had entered and admitted assets: His Honour acted in this case unwillingly and contrary, it seems, to his own opinion, on the authority of the decision of Shadwell, V.-C., in *Phillips* v. *Everard* (*t*): And the learned Judge said that, in this case, the lease must be so framed that no personal liability should be incurred by the executors; though if the lease were a beneficial one claimed by them, they must enter into full covenants.

Liability of executor of vendee of a real estate to complete the purchase.

Apart from Locke King's Act, if the purchaser of real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator (*u*). And in any case in which the heir or devisee may still be entitled to have the estate paid for by the executor or administrator, as where the testator or intestate has excluded the operation of Locke King's Act by the expression of a contrary intention, if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him (*x*). And in

(*p*) *Nation* v. *Tozer*, 1 Cr. M. & R. 172; see also *ante*, p. 719.

(*q*) *Thacker* v. *Wilson*, 3 A. & E. 145.

(*r*) Nor in the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which has taken the place of the above statute, is there anything to alter the liability of executor or administrator as established in the case above cited.

(*s*) 1 K. & J. 571.

(*t*) 5 Sim. 102.

(*u*) *Milner* v. *Mills*, Mosely, 123; *Broome* v. *Monck*, 10 Ves. 597. As to the effect of Locke King's Act Amendment Act, 1877 (40 & 41 Vict. c. 34), see *Re Cockcroft*, 24 C. D. 94; and *ante*, p. 1326, note (*p*).

(*x*) *Broome* v. *Monck*, 10 Ves. 614, 615; Sugd. V. & P. 14th edit. 192. See *Lord* v. *Lord*, 1 Sim. 505.

such a case, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it would seem, be entitled to the personalty so far as it goes: And it was decided, that if by reason of the complication of the testator's affairs, the purchase-money could not be immediately paid, and the vendor for that reason rescinded the contract, yet on the coming in of the assets, the devisee of the estate contracted for might compel the executor to lay out the purchase-money in the purchase of other estates for his benefit (*y*).

But if a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal, in consideration of the Court, upon which the right of the executor on the one hand (*z*), and of the heir or devisee on the other, depends: And therefore, if the vendor dies, the estate will go to the heir-at-law of the vendor, in the same manner as if no contract had been entered into (*a*): and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*b*): The Court cannot speculate upon what the deceased party would or would not have done; but in these cases the inquiry must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform (*c*): That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor a right to call upon his heir (*d*).

Similar principles apply where a vendor dies after there is a valid contract made for the sale of land, and before the sale has been carried out. In such case the purchase-money will devolve as personal estate (*e*): And if the land contracted to be sold has

Devolution of real estate contracted to be sold.

(*y*) *Whittaker* v. *Whittaker*, 4 Bro. C. C. 31; *Broome* v. *Monck*, 10 Ves. 597; Sugd. V. & P., 14th edit. 192. And see *Lysaght* v. *Edwards*, 2 C. D. 499, 521.

(*z*) See *ante*, pp. 497, 498; Sugd. V. & P. 14th edit. 193.

(*a*) *Lacon* v. *Mertins*, 3 Atk. 1; *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218; *Buckmaster* v. *Harrop*, 7 Ves. 341. See also *Johnson* v. *Le Garde*, 1 Turn. & Russ. 281.

(*b*) *Green* v. *Smith*, 1 Atk. 573; *Broome* v. *Monck*, 10 Ves. 597.

(*c*) See *Curre* v. *Bowyer*, 5 Beav. 6, note (*b*); *ante*, p. 498.

(*d*) Sugd. V. & P. 14th edit. 193. See also *Lysaght* v. *Edwards*, 2 C. D. 499, 507, *per* Jessel, M. R. And compare *Re Thomas*, 34 C. D. 166.

(*e*) See *Lysaght* v. *Edwards*, 2 C. D. 499; *Re Thomas*, 34 C. D.

not been conveyed in the lifetime of the testator or intestate, the heir-at-law or devisee will take no beneficial interest. Formerly, the executor could not himself convey the estate, the subject of the contract, but now by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4 (1), "where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract." This section is not to affect the beneficial rights of any person claiming as heir or devisee, and is only to apply in cases of death after the commencement of the Act (the 1st day of January, 1882).

And by sect. 30 of the same Act, which also is only to apply in cases of death after the commencement of the Act, it is provided that, "Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers."

The result of these two sections, in cases of death after December 31st, 1881, is that where the vendor is a trustee for the purchaser, as defined by Jessel, M. R., in *Lysaght* v.

166; *Farrer* v. *Earl of Winterton*, 5 Beav. 1. See also *Frayne* v. *Taylor*, 33 L. J. Ch. 228; *Re Harrison*, 34 C. D. 214.

Edwards (*f*), and the Court of Appeal in *Re Colling* (*g*), the personal representatives are, under sect. 30, the proper persons to convey, and where, though the vendor is not a trustee within that definition, there is a contract enforceable against the heir or devisee, the personal representatives will be the proper persons to convey under sect. 4 (*h*).

Now, with regard to persons dying on or after the 1st January, 1898, under sect. 1 of the Land Transfer Act, 1897, the real estate as therein defined devolves to and becomes vested in the personal representative (*i*), who consequently in all such cases will be the proper person to convey.

Liability of an executor to exonerate specific legatees:

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator (*k*).

Therefore if the legacy be of a silver cup or a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him (*l*).

So in *Stewart* v. *Denton* (*m*), the testator, a wine merchant, directed by his Will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines: Before the death of the testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported: After his death the wines were entered: And it was held, that the executors, and not the legatees, were chargeable with the duties.

of leaseholds:

In *Marshall* v. *Holloway* (*n*), A., having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject, as to the latter, to the payment of his debts, to trustees for B. for life with several limitations over: A. died before the time expired, leaving the covenant unperformed in part: and Sir L. Shadwell, V.-C., held that his general personal estate was

(*f*) 2 C. D. 499, 507.

(*g*) 32 C. D. 333.

(*h*) See further Wolstenholme & Brinton's Conveyancing and Settled Land Acts, 8th edit. pp. 25, 86.

(*i*) *Ante*, p. 1275.

(*k*) *Knight* v. *Davis*, 3 M. & K. 358; *Bothamley* v. *Sherson*, L. R. 20 Eq. 304.

(*l*) Swinb. Pt. 7, s. 20, pl. 18.

(*m*) 4 Dougl. 219.

(*n*) 5 Sim. 196; compare *Farquhar* v. *Haddon*, L. R. 7 Ch. 1.

liable to the performance of the covenant. But it would seem that it was the clause which directed the debts to be paid out of the personal estate which governed this decision (*o*), and its authority has since been doubted (*p*). Unquestionably, the general rule is, that the legatees of leasehold estates must take them *cum onere* (*q*), and notwithstanding the general personal estate may remain liable to the lessor by reason of the covenants contained in the lease (*r*).

In *Hawkins* v. *Hawkins* (*s*) a testator specifically bequeathed certain personal estate upon trust for H. and her children after payment thereout of a legacy and of his debts and funeral expenses, and bequeathed his residuary estate to the plaintiff, whom he appointed his executor. Part of the residuary estate consisted of a leasehold house, held for a term of years at a rack-rent and considerably out of repair. This leasehold being worthless, the plaintiff, five months after the testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residuary estate as a whole was valuable. And it was held on appeal (reversing Malins, V.-C.), that the plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidation and for rent subsequent to the testator's death paid out of the specifically bequeathed property, on the ground that the liability of the testator's estate to pay the future rent and its liability to damages for the dilapidations were not debts,

(*o*) *Fitzwilliams* v. *Kelly*, 10 Hare, 266, 278.

(*p*) *Eccles* v. *Mills*, [1898] A. C. 372.

(*q*) *Hickling* v. *Boyer*, 3 Mac. & G. 635; *Fitzwilliams* v. *Kelly*, 10 Hare, 266; *Armstrong* v. *Burnet*, 20 Beav. 432; *Hawkins* v. *Hawkins*, 13 C. D. 470. Hence, if the demised premises are dilapidated, the executors may require an indemnity against their liability in this respect from the legatee before letting him into possession: *Hickling* v. *Boyer*, 3 Mac. & G. 635. See further, as to where an executor is entitled to an indemnity, *ante*, p. 1080; and also cf. *Re Courtier*, 34 C. D. 136, and other cases referred to *ante*, p. 1358, n. (*m*).

(*r*) Moreover, where the burden is of such a character that the leasehold can be described as "charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money," Locke King's Act will apply as mentioned above. See p. 1328.

(*s*) 13 C. D. 470, in which case *Marshall* v. *Holloway*, *ubi supra*, does not seem to have been cited. The decision in the latter case was not, however, affected by that in the former: *Eccles* v. *Mills*, [1898] A. C. 360, 373.

within the meaning of the clause in the Will directing the payment of debts, as between the residuary and specific legatees.

It is said by Sir George Jessel, M. R., in *Bothamley* v. *Sherson* (*t*), that, "In fact, the distinction seems to turn on this: is the charge one created by the testator for what has been called a temporary purpose, that is, with the view of raising money or of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares? In the first case the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case he is not entitled, because the testator is supposed to give the thing as it is, and the charge upon it is really not in strictness an incumbrance, but something incident to the nature of the thing."

The obligation of completing the testator's interest in the subject-matter of the bequest falls on the testator's general estate (*u*). Although everything that is due from the testator at his death must be paid out of his residuary personal estate, yet, as between the specific bequest and the residue, that which may become due subsequently is not so payable, notwithstanding that by reason of his covenant the testator's residuary personal estate may remain liable thereto. Thus with respect to specific legacies of shares in banking or other public companies, if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate; but if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee (*x*).

of shares in public companies.

(*t*) L. R. 20 Eq. 304, 316.

(*u*) *Armstrong* v. *Burnet*, 20 Beav. 424; *Fitzwilliams* v. *Kelly*, 10 Ha. 266; *Eccles* v. *Mills*, [1898] A. C. 373.

(*x*) *Blount* v. *Hipkins*, 7 Sim. 43; *Jacques* v. *Chambers*, 2 Coll. 435; 11 Jur. 295; *Clive* v. *Clive*, Kay, 600; *Wright* v. *Warren*, 4 De G. & Sm. 367; *Armstrong* v. *Burnet*, 20 Beav. 424. See also *Moffett* v. *Bates*, 3 Sm. & G. 468; *Day* v. *Day*, 1 Dr. & Sm. 261; *Addams* v. *Ferick*, 26 Beav. 384. But this does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares) as an entire fund. There the true test is, whether the shares have or have not been separated from the general residue at the date of the call: *Re Box*, 1 Hemm. & M. 552. See also the cases collected, *ante*, p. 1178, note (*m*).

Liability of executor as to apprentices and articled clerks.

There has already been occasion to show, that on the death of the master, the agreement for service on the part of the apprentice is at an end, generally speaking (*y*): And it seems equally well established, that the executors of the master are discharged from all agreements and covenants *for the instruction* of the apprentice, for these are considered as personal to the testator, and determined by his death (*z*). But the covenant on the part of the master *for maintenance* of the apprentice still continues in force (*a*); and therefore the executor is liable in an action of covenant, as far as he has assets, if he neglects to maintain him (*b*). By the custom of London, the executor shall put the apprentice to another master of the same trade (*c*). As to maintenance of parish apprentices by executors, particular provisions on this head have been made by the statute 32 Geo. III. c. 57, which has already been stated at large (*d*). Where an attorney or other person, to whom a clerk or youth has been articled or apprenticed, dies before the articles expire, his estate is not liable for the return of any part of the premium (*e*).

Liability of executor for poor rate, where testator being assessed dies before payment:

In case a person assessed to the poor rate dies before payment, it has been doubted how far the goods of the deceased in the hands of his executor or administrator are liable to answer the same: In the case of *Stevens* v. *Evans* (*f*), the point was discussed, but not decided, as the case was determined on its own peculiar circumstances, viz., on the ground that it was necessary to convene the administrator before the justices, before a warrant could legally issue to distrain: So that the principal point was undecided; which includes in it these particulars: 1. Where

(*y*) *Ante*, p. 626 *et seq.*

(*z*) *R.* v. *Peck*, 1 Salk. 66; *Baxter* v. *Burfield*, 2 Stra. 1266; *Wadsworth* v. *Gay*, 1 Keb. 820; *ante*, p. 1350. The decision in *Walker* v. *Hull*, 1 Lev. 177, was *contrà*: but the Court denied this case in *Baxter* v. *Burfield*, 2 Stra. 1267. But see *Cooper* v. *Simmons*, 7 H. & N. 707, *ante*, p. 627.

(*a*) *R.* v. *Peck*, 1 Salk. 66; *S. C.*, *nomine R.* v. *Pett*, 1 Show. 405; *Baxter* v. *Burfield*, 2 Stra. 1266; *Soam* v. *Bowden*, Finch. Rep. 396.

(*b*) But an order of magistrates that the executor or administrator shall maintain and provide for the apprentice is bad, and may be quashed: *R.* v. *Pett*, 1 Show. 405; *S. C.*, Carth. 231; 1 Salk. 66; 3 Salk. 41; 12 Mod. 27; *R.* v. *Chaplin*, Comberb. 324.

(*c*) By Lord Holt, in *R.* v. *Peck*, 1 Salk. 66.

(*d*) *Ante*, p. 627.

(*e*) *Whincup* v. *Hughes*, L. R. 6 C. P. 78; and *Ferns* v. *Carr*, 28 C. D. 409. *Hirst* v. *Tolson*, 2 Mac. & G. 134, must now be treated as overruled. See also *ante*, p. 627.

(*f*) 2 Burr. 1152; 1 W. Black. 284.

the warrant of distress is made out during the lifetime of the person assessed, whether the officers can follow the goods into the hands of the administrator or any other, without taking notice of any person as executor or administrator: 2. Where the warrant of distress is not made out till after the death of the person assessed, whether on summoning the administrator, and refusal by him, the officers can distrain the goods in the hands of such administrator: 3. Whether the administrator himself may be assessed in a succeeding rate, as for arrears; and on the assessment being confirmed at the sessions upon his appeal, whether distress may be made as of his own goods, and whether for defect of distress he may be committed: 4. In what course of administration such assessment shall be estimated: And if the administrator shall plead before the justices debts of a higher nature, or insufficiency of assets, whether and how far the justices are to take notice of such plea, and how or in what manner they shall determine the same (*g*).

Church-rates.

It was held in the Ecclesiastical Court that the obligation to pay a church-rate was a personal obligation: And that the executor of a deceased parishioner could be cited in respect of a church-rate due from his testator (*h*).

Debts of husband and wife.

With respect to debts which a wife contracted while single, and which remained due at the time of the marriage, at common law the husband is liable, as long as both parties are alive: But this liability, which originated in the marriage, ceases with it: And therefore upon the death of the husband before the wife, and before payment, the debts survive against her, and the executor of the husband is discharged from them (*i*).

Again, if the husband survives the wife, he will not be individually responsible for her debts contracted before marriage, however large a fortune he may have received with her (*j*). Nevertheless, as her administrator, he will be liable to answer for them, to the extent of her assets (*k*).

(*g*) Burn's Justice, title Poor, vol. iv. p. 228, 229, edit. of 1836.

(*h*) *Williams* v. *George*, 3 Curt. 343. By stat. 31 & 32 Vict. c. 109, compulsory church-rates were abolished, with a saving of rates called "church-rates," but applicable for a secular purpose.

(*i*) *Woodman* v. *Chapman*, 1 Campb. 189.

(*j*) Wentw. Off. Ex. 369, 14th edit.

(*k*) *Ibid.* 370; *Heard* v. *Stanford*, Cas. temp. Talb. 173; *S. C.*, 3 P. Wms. 409. As to what her assets comprise, see *ante*, p. 521

This question of the ante-nuptial debts and liabilities of a married woman has been dealt with by the Married Women's Property Act, 1882, as follows:

45 & 46 Vict. c. 75, s. 13. Wife's ante-nuptial debts and liabilities.

Sect. 13. "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property (*l*) for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

Sect. 14. Husband to be liable for wife's ante-nuptial debts to a certain extent.

Sect. 14. "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Act relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become

et seq., p. 640 *et seq.*, p. 1302 *et seq.*

(*l*) See sect. 19 of the Act; *Jay* v. *Robinson*, 25 Q. B. D. 467; and sect. 1 of the Married Women's Property Act, 1893. And generally as to liability of a married woman's property, notwithstanding restraint on anticipation, see *Sanger* v. *Sanger*, L. R. 11 Eq. 470; *London Provincial Bank* v. *Bogle*, 7 C. D. 773; *Re Hedgeley*, 34 C. D. 379; *Robinson, King & Co.* v. *Lynes*, 22 Q. B. D. 548; *Pelton Bros.* v. *Harrison*, [1891] 2 Q. B. 422; *Re Wheeler's Trusts*, [1899] 2 Ch. 717; *Birmingham Excelsior* v. *Lane*, [1904] 1 K. B. 35; and see also *post*, p. 1569.

entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise: and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

General result.

The general result of these sections seems to be this. Whereas at common law a husband was liable to the ante-nuptial debts of his wife to the whole extent of his property whether he knew of their existence or not, and whether he obtained any property from his wife or not: but he could not be sued alone for such debts if his wife was alive; and he could not be sued at all for them after his wife's death, except as her administrator: now, by the effect of these sections, the husband is liable only so far as he has acquired or become entitled to property from or through his wife, and he can be sued without the wife, and whether she be alive or dead (*m*). It must be noted, however, that these sections of the Act will not apply to cases where the marriage has taken place before August 9th, 1870, which will be governed by the common law as explained above, or, in the case of marriages between August 9th, 1870, and December 31st, 1882, inclusive, by the Married Women's Property Act, 1870, and the amending Act of 1874. As regards marriages between these dates the law stands shortly thus. Where the husband and wife were married on or after August 9th, 1870, and before July 30th, 1874, sect. 12 of the Act of 1870 entirely relieves the husband of all liability for his wife's ante-nuptial debts, and gives the creditor an equitable remedy only against the wife's separate estate (*n*). But the liabilities of the husband for his wife's torts committed, or

(*m*) See *Beck* v. *Pierce*, 23 Q. B. D. 316, 321.

(*n*) See as to the construction of this section, *Sanger* v. *Sanger*, L. R. 11 Eq. 470; *Re Hedgeley*, 34 C. D. 379. And see *ante*, p. 571, note (*i*).

breaches of contract made, before marriage were not affected by the statute. Where, however, the marriage took place on or after July 30th, 1874, and before January 1st, 1883, the amending Act of 1874 provides that the husband and wife may be jointly sued for any ante-nuptial debt of the wife or for any tort committed, or breaches of any contract made by the wife before marriage, and that the husband shall be liable in respect of such matter to the extent of the assets specified in sect. 5, which, briefly, are any property which the husband has acquired or might have acquired from or through his wife.

Liability in respect of fraud or tort committed by wife during coverture.

Although a husband is not liable on his wife's contract, he is liable for any fraud or other tort committed by her during the coverture, unless it is directly connected with the contract, and is the means of effecting or inducing it and is part of the same transaction. The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts during coverture, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her during coverture (*o*).

Husband's liability as a contributory in respect of his wife's shares in a company.

After the passing of the Married Women's Property Acts, 1870, 1874, it was held, in *Re West of England Bank* (*p*), that where a woman, absolutely entitled to shares in a company, married in 1878, and before the marriage the shares were settled absolutely upon her for her benefit, that this did not relieve the husband from his liability as a contributory under the 78th section of the Companies Act, 1862, which enacts that "if any female contributory marries either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly. The ground of this decision was that the section made the husband liable as the debtor, not as the husband of the debtor.

By the Married Women's Property Act, 1882, s. 13, a woman after her marriage shall continue to be liable in respect or to the extent of her separate property for all debts contracted and all contracts entered into before her marriage, including

(*o*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 2 Ch. 585. See also *Beaumont* v. *Kaye*, [1904] 1 K. B. 292.

(*p*) 12 C. D. 284.

any sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories under and by virtue of the Acts relating to joint stock companies: and by sect. 14, the husband shall be liable for the debts of his wife contracted, and for all contracts entered into, by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid to the extent of all property belonging to his wife which he shall have acquired or become entitled to from or through his wife, but he shall not be liable for the same any further or otherwise. There has been no decision as to whether the husband's liability under sect. 78 of the Companies Act, 1862, has been taken away wholly or partially by the Married Women's Property Act, 1882 (*q*).

On one occasion (*r*), Sir John Leach, V.-C., expressed a doubt, whether the husband has a right to throw his wife's funeral expenses upon her separate estate.

Wife's post-nuptial debts.

With respect to debts contracted by a wife after marriage, so far as the supply of necessaries is concerned, it shall be presumed, as long as he lives, that she had the authority of the husband, as his agent, to procure them for her own use (*s*). He may consequently be compelled to pay for them, and so may his executors if he has assets: But the authority will be revoked by the death of the husband; and therefore his executor is not liable for necessaries supplied to the wife after the decease of the husband, even (according to one case) although the fact of his being dead were unknown at the time the necessaries were provided: Accordingly, in *Blades* v. *Free* (*t*), a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this

(*q*) For the authorities on the liability of the husband of a female shareholder who marries, see Buckley on the Companies Acts, 8th edit. pp. 86 and 87.

(*r*) *Gregory* v. *Lockyer*, 6 Madd. 90. See *Bertie* v. *Chesterfield*, 9 Mod. 31; *Willeter* v. *Dobie*, 2 Kay & J. 647. In *Re McMyn*, 33 C. D. 575, however, Chitty, J., held that a husband, executor of his wife's Will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, and her Will did not contain any charge of debts and funeral expenses.

(*s*) As to the extent of this presumption and how far the agency is a question of fact, see *Debenham* v. *Mellon*, 6 A. C. 24; *Morel Bros. & Co., Ltd.* v. *Earl of Westmoreland and Wife*, [1903] 1 K. B. 64.

(*t*) 9 B. & C. 167.

country, and died abroad: And it was held, that the woman might have the same authority to bind him by her contracts for necessaries, as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received (*u*).

Work and labour with a view to a legacy.

It may be observed, that if a man performs services for the testator, as if a stockbroker transacts all the money concerns of the deceased, without any view to a reward, but in the expectation of a legacy, he cannot set up any demand for such services against the executor or administrator (*x*). Where, however, a surgeon forebore to send in his bill for medicine and attendance to a deceased patient in her lifetime *under the expectation* of a legacy; and on her death, finding she had left him nothing, he made a claim on her executors; it was held that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy (*y*).

Executor of tenant for life who neglects to renew lease.

In *Colegrave* v. *Manby* (*z*), a tenant for life of a hospital lease, who was directed to lay by, out of the rents and profits, for the purpose of paying the fine on renewal, had neglected to renew, and the lease having been renewed by the remainderman, after his death, a reference, on a bill against his executrix, was made, to ascertain what was a reasonable sum to be paid for the renewal; and the same was ordered to be paid by the executrix.

Executors must be admitted to copyhold and pay fines.

It was once held, that executors continued the estate which their testator had in a copyhold, and, therefore, that they needed no admission: But it is now settled that they must be regularly admitted, and pay their fines (*a*). And by sect. 1 (4) of the Land Transfer Act, 1897, the expression "real estate," in Part I. of that Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in

(*u*) See *Smout* v. *Ilbery*, 10 M. & W. 11. But see also Smith's Leading Cases, 9th edit., Vol. II., p. 517 *et seq.*

(*x*) *Osborn* v. *Guy's Hospital*, 2 Stra. 728; *Le Sage* v. *Coussmaker*, 1 Esp. 188; cf. *Maddison* v. *Alderson*, 8 A. C. 467.

(*y*) *Baxter* v. *Gray*, 3 M. & Gr. 771. But see *Shallcross* v. *Wright*, 12 Beav. 558, and *post*, p. 1438.

(*z*) 6 Madd. 72.

(*a*) *Bath* v. *Abney*, 1 Burr. 206. See *ante*, p. 1296, as to trust and mortgage estates in copyhold property.

which an admission or any act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

Scire facias or *certiorari* against executor of Judge, &c.

If a bill of exceptions was sealed by a Judge and he died, a *scire facias* lay against his executors or administrators to certify it (*b*). So if the person who ought to certify a record, as a justice of the peace, &c., who hath taken a recognizance, or a Judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, &c., happen to die, having such a record in his custody, it seems that a *certiorari* may be directed to his executor or administrator to certify it (*c*).

Executor not compellable to complete the gift of testator.

As a Court of Equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of the testator: Therefore an act of bounty which has not been perfected by the testator is of no avail against his executor (*d*).

As to corroboration in cases of claims against estate of deceased persons.

It has been said (*e*) that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person, but there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, such uncorroborated evidence should be examined with care and even with suspicion, but if in the result it convinces the Court that the claim should be allowed, the Court should allow the claim. The rule, such as it is, is a rule of prudence rather than of law, and applies to cases of alleged debt as well as to cases of alleged gift (*f*). In the case of *Hill*

(*b*) 2 Inst. 428. By the Judicature Act, 1875, Ord. LVIII. r. 1, bills of exceptions are abolished.

(*c*) 2 Hawk. B. 2, c. 27, s. 39.

(*d*) *Hooper* v. *Goodwin*, 1 Swanst. 485; *Cotteen* v. *Missing*, 1 Madd. 176; *Meek* v. *Kettlewell*, 1 Phil. Ch. C. 342; *Callaghan* v. *Callaghan*, 8 Cl. & F. 374; *Searle* v. *Law*, 15 Sim. 95; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Ward* v. *Audland*, 8 Beav. 201; *Cox* v. *Barnard*, 8 Hare, 310; *Bridge* v. *Bridge*, 16 Beav. 315; *Weale* v. *Ollive*, 17 Beav. 252; *Beech* v. *Keep*, 18 Beav. 285. An executor may be compelled to execute an agreement by the testator to grant an annuity: *Nield* v. *Smith*, 14 Ves. 491.

(*e*) See *Re Whittaker*, 21 C. D. 657, 663.

(*f*) *Loveseу* v. *Smith*, 15 C. D. 655; *Re Finch*, 23 C. D. 267; *Re Garnett*, 31 C. D. 1; *Re Hodgson*, 31

v. *Wilson* (*g*) which, however, was a case where parol evidence was tendered for the purpose of altering the terms of a written contract made with the deceased, Lord Justice James said: "The evidence given is the parol evidence of the maker of a promissory note as to a conversation alleged to have taken place between himself and the person to whom the note was given, that person being dead. Even if such evidence be legally admissible for any purpose, the interests of mankind, in my opinion, imperatively require that, unless corroborated, it should be wholly disregarded. Nobody would be safe in respect of his pecuniary transactions if legal documents found in his possession at the time of his death, and endeavoured to be enforced by his executors could be set aside, or varied, or altered by the parol evidence of the person who had bound himself. It would be very easy of course for anybody who owed a testator a debt to say, 'I met the testator, and he promised he would not sue.' 'I met the testator and I gave him the money.' 'I met the testator, and in consideration of something he agreed to relieve me.' The interests of justice and the interests of mankind require that such evidence should be wholly disregarded."

Liability of executor of a man who has delivered a deed as an escrow.

If a person, who has delivered a deed as an escrow, to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be afterwards performed, the deed is available notwithstanding the death of him that made it (*h*).

A note made payable with interest by executors at a certain period from the testator's death, bears interest from the date.

It may here be mentioned, that if a testator has given a promissory note in this form, "I promise for myself and my executors to pay A. B. or his executors, one year after my death, 300*l.*, with legal interest," and no proof of the consideration can be given, the note bears interest from its date, and not merely from the testator's death; for, in the absence of all particular proof, it must be presumed that the note was given for value (*i*).

C. D. 177; *Re Farman*, 57 L. J. Ch. 637, 639; *Rawlinson* v. *Scholes* (1898), 79 L. T. 350.

(*g*) L. R. 8 Ch. 888; cf. *Parish* v. *Parish*, 32 B. 207.

(*h*) By Lord Ellenborough, in *Copeland* v. *Stephens*, 1 B. & A. 606, where *executor* appears to be printed by mistake for *escrow*. See also, as to the nature of an *escrow*, *London Freehold and Leasehold Property Co.* v. *Baron Suffield*, [1897] 2 Ch. 608.

(*i*) *Roffey* v. *Greenwell*, 10 A. &

Liability of executor on a continuing guaranty of testator.

The death of the surety does not *per se* operate as a revocation of a continuing guaranty (*k*), and his executor may be liable in respect of advances made after the testator's death (*l*).

Although upon the death of the surety no express notice of the death has been given by the executor, still, if the fact of such death has come to the knowledge of the creditor, it seems in the absence of express provision that this will operate as a revocation of the guaranty, and the executor will not be liable for subsequent advances made thereunder (*m*).

But a guaranty, the consideration for which is given once and for all, as for instance where an office or employment is conferred in consideration of such a guaranty, cannot be determined by the guarantor, and does not cease on his death (*n*).

E. 222. See also Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (3).

(*k*) By sect. 18 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which substantially re-enacts sect. 4 of the Mercantile Law Amendment Act, 1856, it is enacted that:—"A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transaction of which the guaranty or obligation was given."

(*l*) Smith's Merc. Law, 9th edit. 474; *Bradbury* v. *Morgan*, 1 H. & C. 249; *Harriss* v. *Fawcett*, L. R. 15 Eq. 311; L. R. 8 Ch. 866, 869, *per* Mellish, L. J.; *Re Silvester*, [1895] 1 Ch. 573.

(*m*) *Harriss* v. *Fawcett*, *ubi supra*; *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Re Whelan*, *deceased*, [1897] 1 I. R. 575.

(*n*) *Gordon* v. *Calvert*, 2 Sim. 253; 4 Russ. 581; *Lloyd's* v. *Harper*, 16 C. D. 290; *Re Crace*, [1902] 1 Ch. 733.

CHAPTER THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR WITH RESPECT TO HIS OWN ACTS.

SECTION I.

Of the Liability of an Executor or Administrator on his own Contracts.

IN this section it is proposed to investigate, First, the liability of an executor or administrator, *as such*, in respect of his own contracts as executor or administrator: Secondly, the personal responsibility of the executor or administrator on his own contracts (*a*).

1st. Of the liability of an executor, as such, on his own contracts.

1st, As to the liability of the executor, not personally, but out of the assets of the testator. It seems to have been once considered, that wherever an action was brought against an executor or administrator, on promises laid to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity (*b*). The more modern authorities have, however, established, that, in several instances, the executor may be sued, *as executor*, on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator.

Thus in *Dowse* v. *Coxe* (*c*), the declaration stated that a cause depending in Chancery in which Thomas Biddle was a party, was referred to arbitration, and that it was one of the terms of

(*a*) Notwithstanding the change in the system of pleadings since the Judicature Act, it has been thought more convenient to leave this section as it stood in the former Editions of this Work.

(*b*) See *Trewinian* v. *Howell*, Cro. Eliz. 91; *Hawkes* v. *Saunders*, Cowp. 289; *Jennings* v. *Newman*, 4 T. R. 348.

(*c*) 3 Bing. 20; *S. C.*, 10 Moore, 272.

submission that in case either of the parties should die, the death was not to abate the reference; that Thomas Biddle died before the making of the award; that the arbitrator awarded that the executor should pay the plaintiff 225*l.* out of the assets of Thomas Biddle; and that being so liable, the defendant, executor as aforesaid, *promised to pay:* And the Court of C. B. held that the executor was not charged thereby personally, but as executor only, and that the judgment must be *de bonis testatoris* (*d*).

So in *Powell* v. *Graham* (*e*), one count of the declaration stated a promise by the testator in his lifetime, that, in consideration the plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the plaintiff 20*l.*, and then averred the defendant's liability as executor, and that in consideration thereof *the defendant promised to pay* the plaintiff that sum, whenever he, the defendant, as executor, should be requested so to do: And the Court of C. B. held, that, upon this count, the defendant was not liable individually, but as executor only: And in the same case the Court held, and it is now fully settled, that a count averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof *the defendant as executor promised to pay* the balance, does not charge him personally; but he may plead *plene administravit*, and the whole judgment which can be given in favour of the plaintiff is *de bonis testatoris* (*f*): And it makes no difference whether the account be averred to have been stated of money due from the testator to the plaintiff (*g*), or of money due from the defendant *as executor* to the plaintiff (*h*).

So it would seem that a count averring that the defendant, *as executor*, was indebted to the plaintiff for so much money, paid by the plaintiff to the use of the defendant, *as executor*, and that in consideration thereof the defendant, *as executor*, *promised to*

(*d*) This judgment was reversed in K. B., but on a different ground, the Court of Error declining to give any opinion on this point: 6 B. & C. 255. As to the personal responsibility of an executor on a submission to arbitration, see *post*, p. 1424.

(*e*) 7 Taunt. 581; *S. C.*, 1 B. Moore, 305.

(*f*) *Ashby* v. *Ashby*, 7 B. & C. 444.

(*g*) *Secar* v. *Atkinson*, 1 H. Bl. 102; *Ellis* v. *Bowen*, Forrest, Exch. Rep. 98. This is the common mode of declaring against executors to save the Statute of Limitations, 1 H. Bl. 105.

(*h*) *Powell* v. *Graham*, 7 Taunt. 580; *Ashby* v. *Ashby*, 7 B. & C. 444: but see *Rose* v. *Bowler*, 1 H. Bl. 108; 2 Saund. 117, *h*, note to *Coryton* v. *Litheby*.

pay, charges the defendant in his representative character only, and that he may plead *plene administravit* to it, and that the judgment ought to be *de bonis testatoris* (*i*). For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued and obliged to pay the whole debt: In such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and it would therefore seem that he is entitled to sue the executor of the deceased for money paid to his use as executor (*j*). Again, a plaintiff may in many cases have an advantage in proceeding against the assets rather than against the executor personally: the executor in his individual capacity may be insolvent; in his character of executor he may have assets adequate to answer any claim: and when the money is paid to his use as executor, justice seems to require that the person who has made the payment should have the liberty of looking to the fund which the executor has in that character (*k*).

But a count alleging that the defendant, *as executor*, was indebted to the plaintiff for so much money *lent* by the plaintiff to the defendant, *as executor*, and that the defendant, in consideration thereof, *as executor promised to pay*, charges him personally, and he cannot plead *plene administravit*, and the only possible judgment is *de bonis propriis* (*l*).

(*i*) *Ashby* v. *Ashby*, 7 B. & C. 448, 449, 451, 452. This point was conceded by the counsel and the Court, in *Corner* v. *Shew*, 3 M. & W. 350.

(*j*) *Ashby* v. *Ashby*, 7 B. & C. 449, 451, 452, by Bayley, J., and Littledale, J. See also *Batard* v. *Hawes*, 2 E. & B. 287, 298, where these *dicta* were regarded as strong authority for holding, that if one of several co-contractors be compelled by suit to pay the whole debt, he may sue the executors of another of them, *who has died before payment* for contribution.

(*k*) *Ashby* v. *Ashby*, 7 B. & C. 449. But it must not be understood that one who has paid off a debt of a testator or advanced money to an executor to enable him to do so, can follow the assets into the hands of another to whom the executor has aliened them: *Haynes* v. *Forshaw*, 11 Hare, 104; *ante*, p. 700, note (*d*).

(*l*) *Rose* v. *Bowler*, 1 H. Bl. 108; *Powell* v. *Graham*, 7 Taunt. 586. An executrix of a testator kept an executorship account with a bank, and, having a power under the Will to mortgage the real estate in aid of the personalty deposited with the bank the title deeds of part of the testator's real estate as security for the balance. The account having been considerably overdrawn, and the moneys to a great extent misapplied, the bank having no notice of such misapplication, and the security proving insufficient to pay the balance,

And so it is of a count which charges that the defendant, *as executor*, was indebted to the plaintiff *for money had and received* by the defendant, *as executor*, for the use of the plaintiff, and that in consideration thereof, the defendant, *as executor*, *promised to pay;* for to such a count *plene administravit* cannot be pleaded, and the judgment on it must be *de bonis propriis* (*m*). But in *Ashby* v. *Ashby* (*n*), Lord Tenterden said, that although he felt himself bound by the authorities on the point, yet if the matter were quite new, it might, perhaps, be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the executor in his character of executor, and take his chance whether he would get paid out of the assets or not, and that if he elected so to treat it, then he must show that the money came into the defendant's hands because he was executor: And Bayley, J., concurred in this opinion, and put the following case: "Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person: Before the bill arrives, the testator dies, and his executor receives the money: It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration: He may be insolvent in his individual capacity; and it would be hard that the party, under such circumstances, should not have his election to be paid out of the funds of the testator": The learned Judge, however, proceeded to observe, that the authorities were so strong, that he felt himself bound by them, although his reason was not convinced (*o*).

applied to prove against the testator's estate for the difference. It was held on appeal by L. JJ. James and Mellish that the bank was not entitled to prove, for that a person cannot, by contract with an executor, acquire a right to prove against the estate, though the executor has power to give him a lien on specific assets: *Farhall* v. *Farhall*, L. R. 7 Ch. 123.

(*m*) *Rose* v. *Bowler*, 1 H. Bl. 198; *Jennings* v. *Newman*, 4 T. R. 347; *Brigden* v. *Parkes*, 2 B. & P. 424; *Powell* v. *Graham*, 7 Taunt. 585, 586; *Ashby* v. *Ashby*, 7 B. & C. 444.

(*n*) 7 B. & C. 448.

(*o*) 7 B. & C. 450. But Littledale, J., expressed his opinion that, if the case were perfectly new, the defendant ought to be held personally liable upon the count in question; and observed, that where an executor receives money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the

Again, a count upon a promise by the defendant *as executor*, for *use and occupation* after the death of the testator, has been held to charge the defendant personally, and not in his character of executor (*p*). So a count alleging that the defendant, *as executor*, was indebted to the plaintiff for *goods sold and delivered* by the plaintiff to the defendant, *as executor*, at his request, or for *work done* and materials for the same used and provided by the plaintiff for the defendant, *as executor*, at his request, and that the defendant, *as executor*, promised to pay, charges the defendant in his personal and not in his representative character; for such a claim must necessarily be for debts due from the defendant in his own right, as no goods can be sold to or work performed for another in his representative character (*q*). The common count *for interest* charges the executor personally; for it alleges a forbearance *at his request*: But a count charging that the defendant is indebted *as executor* on a contract by the testator to pay interest as long as the debt should be forborne, charges him as executor only (*r*).

In actions like those above mentioned, which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere *nudum pactum*, if there were no assets (*s*). But it is not necessary to aver in the declaration that the defendant had assets (*t*).

money so received, it having nothing to do with the accounts of the testator: 7 B. & C. 452, 453. Perhaps an illustration of this view may be found in *Churchill* v. *Bertrand*, 3 Q. B. 568, where an intestate had granted an annuity to the plaintiff, and, after his death, his administratrix procured it to be set aside for a defect in the memorial; and it was held that the consideration money for the annuity could not be recovered back as money had and received *by the intestate* for the use of the plaintiff, since the election to vacate the annuity did not make the money had and received to the use of the grantee from the time of the grant by relation.

(*p*) *Wigley* v. *Ashton*, 3 B. & A. 101. But see *Atkins* v. *Humphrey*, 2 C. B. 654.

(*q*) *Corner* v. *Shew*, 3 M. & W. 350. See *post*, p. 1426 *et seq.* as to charging an executor for the expenses of the funeral; also *post*, p. 1634, as to remedies of creditors of an executor.

(*r*) *Bignell* v. *Harpur*, 4 Exch. 773.

(*s*) 1 Saund. 210, c. 211, note (1) to *Forth* v. *Stanton*; *Pearson* v. *Henry*, 5 T. R. 8; *Rann* v. *Hughes*, 7 T. R. 350, note (*a*).

(*t*) *Powell* v. *Graham*, 7 Taunt. 580; *Dowse* v. *Coxe*, 3 Bingh. 20. See also *Pinchon's Case*, 9 Co. 90, *b*.

2ndly, It is now proposed to investigate the personal responsibility of an executor or administrator, arising from his own contracts.

2. Of the personal liability of an executor on his own promise:

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable, unless there be a sufficient consideration to support the promise: For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made (*u*). And by the Statute of Frauds, the executor or administrator will not be liable, unless the promise is in writing. It is clear, however, that although the promise be in writing, it is of no more effect since the statute than before, unless it be by deed or there be a good consideration for it. Hence, since the statute, there are two things necessary for the validity of the promise of the executor or administrator to pay the debt of the testator, or answer damages, out of his own estate: 1st, the common law requires that there should be a sufficient consideration to support the promise; 2nd, the statute adds a still further requisite, that the promise should be in writing (*x*). It is therefore expedient to examine, in the first place, what is a valid consideration for a promise by an executor or administrator to charge him *de bonis propriis:* and then to inquire what is a reduction of the promise into writing, sufficient to satisfy the Statute of Frauds.

Before entering upon this inquiry, it may be remarked, that a promise by an *administrator*, by word of mouth, made *before* administration granted, may, under certain circumstances, be binding upon him afterwards: Thus in *Tomlinson* v. *Gill* (*y*), a person promised the widow of an intestate, that if she would permit him to be joined in the letters of administration, he would make good any deficiency of assets to discharge the intestate's debts; and Lord Hardwicke held that this promise was not within the Statute of Frauds, because the party promising was not administrator at the time of making the

(*u*) *Reech* v. *Kennegal*, 1 Ves. Sen. 126.

(*x*) 29 Car. II. c. 3, s. 4; *Rann* v. *Hughes*, 4 Bro. P. C. 27, Toml. edit.; *S. C.*, 7 T. R. 350, note (*a*). *Hawkes* v. *Saunders*, Cowp. 289; *Philpot* v. *Briant*, 4 Bingh. 717. But see *Herbert* v. *Powis*, 1 Bro. P. C. 355, Toml. edit.

(*y*) Ambl. 330.

promise; and it was no answer to say that he was administrator afterwards (*z*): His Lordship further held, that this was an engagement which could be made good only in a Court of Equity; because it was not made to the creditors, who could, therefore, claim only through the widow; but that they were entitled in equity to the performance of the promise made to her; because it was to be considered there as made to her in trust for them (*a*).

what is a sufficient consideration for his promise:

1st, What is a valid consideration: If a creditor, at the request of an executor, *forbears* to sue him, that is considered a sufficient consideration to charge him *de bonis propriis*, whether he has assets or not at the time of the promise; and therefore it is not necessary to aver in the declaration that he had assets: As if A., to whom the testator was indebted, comes to the executor, and says that he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A. accordingly forbears to sue him for a reasonable time, that is a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt; and a forbearance of a suit is a good consideration, without assets

(*z*) See *ante*, pp. 314, 467 *et seq.*, as to the difference between the relation of probate and letters of administration to the death of the testator and intestate.

(*a*) This case was recognised by Lord Northington in *Griffith* v. *Sheffield*, 1 Eden, 77; and by Sir W. Grant, in *Gregory* v. *Williams*, 3 Meriv. 590. A promise, however, by a party who is neither the executor nor administrator, to pay a debt of a deceased person, is merely *nudum pactum*; and even if such a party should give his promissory note to the creditor for the debt without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal representative of the debtor: *Nelson* v. *Serle*, 4 Mees. & W. 795, overruling *Serle* v. *Waterworth*, *ibid.* 9; *ante*, p. 188. If, indeed, the note be made payable at a future date, *and the maker be entitled to take out administration*, as being the widow or next of kin of the debtor, perhaps the creditor might enforce the note; because the effect of giving it is to preclude the payee during its currency from suing the maker, in case the latter should take out administration: 4 M. & W. 9. Where a widow gave a promissory note "for value received by my late husband," it was held that the note was valid on the face of it: *Ridout* v. *Bristow*, 1 Cr. & Jerv. 231, *post*, p. 1420, note (*m*).

at the time of the promise (*b*). So if a man declares upon a promise against an administrator, that the intestate was indebted to him in 10*l.* by bond, and died, and the defendant being his administrator, in consideration of the premises, and that the plaintiff *would spare him* till such a time after, promised to pay him the debt; and avers that he spared him till the time, and the defendant had not paid him, &c., though he did not say that he would spare him *the debt*, or to *sue him*, yet it shall be so intended, and therefore the consideration is good (*c*). So it was said by Hale, C. J., that though a bare accounting by the executor with a creditor of his testator will not bind the executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will (*d*). Also where the plaintiff having a debt owing to him from the testator on a simple contract, the executor in consideration that the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise: but if the *heir* had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have been against him, because without consideration; for the heir is not chargeable to any debt without specialty (*e*). So where in *assumpsit*, the plaintiff declared that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and no assets *ultra;* upon which the plaintiff demurred, and had judgment without argument; for it was not material whether he had assets or not; for he was charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy was a sufficient consideration; although it was said, that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient (*f*). It is true that it is now

(*b*) *Johnson* v. *Witchcott*, 1 Roll. Abr. 24, tit. Action sur Case (V.), pl. 33, upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. It is said in *Bane's Case*, 9 Co. 94, *a*, that if there be no assets, *it shall be given in evidence:* but this opinion has been overruled since: See the cases in the text, *supra*.

(*c*) *Gardener* v. *Fenner*, 1 Roll. Abr. 15, tit. Action sur Case (S.), pl. 3; *Chambers* v. *Leversage*, Cro. Eliz. 644.

(*d*) *Hawes* v. *Smith*, 2 Lev. 122.

(*e*) *Fish* v. *Richardson*, Yelv. 55, 56.

(*f*) *Davis* v. *Reyner*, 2 Lev. 3; *S. C. nomine Davis* v. *Wright*, 1 Ventr. 120; 2 Keb. 758.

settled that no action at law lies for a general legacy (*g*), but in this case the forbearance might have been to sue in Chancery, or, formerly, in the Ecclesiastical Court, for the legacy, and then the consideration may, perhaps, be a good one (*h*). So if A. together with B. is bound to C. for the proper debt of B., and A. pays the money, and B. dies and makes D. his executor, and D., in consideration that A. will forbear to sue him until such a time, promises to pay him, this is sufficient consideration to support the promise (*i*). So if an executor be indebted to J. S. in 100*l.* who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt *at a future day*, it becomes *his own debt*, and to be satisfied out of *his own estate* (*k*). So B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same at 5*l.* per cent. until the same is settled:" And it was held, that the executors were personally liable to pay the debt and interest (*l*).

Accordingly, where two executors gave a promissory note to the plaintiff in the following words, "*As executors* to the late T. T., we severally and jointly promise to pay to N. C. the sum of 200*l.* on demand *with lawful interest* for the same: And the Court of C. B. held that they were personally liable on the instrument, upon the ground that the promise, from the circumstance of interest being added, necessarily imported a payment at a future day, and an executor promising to pay a debt at a future day makes the debt his own (*m*).

(*g*) *Deeks* v. *Strutt*, 5 T. R. 690. See *post*, pp. 1566, 1567.

(*h*) See 2 Saund. 137, *d.*, note to *Barber* v. *Fox*.

(*i*) *Scott* v. *Stevens*, 1 Sid. 89.

(*k*) *Goring* v. *Goring*, Yelv. 11. See *Reech* v. *Kennegal*, 1 Ves. Sen. 126.

(*l*) *Bradly* v. *Heath*, 3 Sim. 543.

(*m*) *Childs* v. *Monins*, 2 Brod. & Bing. 460; *S. C.*, 5 Moore, 281. See also *Barnard* v. *Pumfrett*, 5 M. & Cr. 71; *Lucas* v. *Williams*, 3 Giff. 151. See also *Ridout* v. *Bristow*, 1 Cr. & J. 231, where a widow had given a promissory note for "value received by my late husband"; and it was held that the note was valid on the face of it; and Bayley, J., said, "If an administratrix takes upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security supersedes the necessity

Again, where the plaintiff declared in *assumpsit* that the defendant's testator was indebted to A., who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use, and that the defendant, in consideration that the plaintiff would accept the defendant as his debtor, promised to pay it to the plaintiff; it was held that this was not a sufficient consideration to support the promise, so as to charge the defendant *de bonis propriis* (*n*): But if the promise had been in consideration of forbearance by such assignee of the debt to sue the executor or administrator, that would have been sufficient (*o*): for it is sufficient, in the case of any other debtor, whom the assignee of the debt forbears, at his request, to sue (*p*).

So where the plaintiff declared in *assumpsit* that the husband of the defendant was indebted to the plaintiff in 50*l.* for beer, and died intestate, and administration was committed to the defendant, and that afterwards, she, in consideration that the

of an investigation as to there being assets. It seems to me that the words 'value received by my late husband' do not make the proof of assets necessary; and I go still further, and say that it was not competent for her to show that there were no assets." But where an executrix gave an acceptance for a debt, due from her testator, taking an engagement from the drawer to renew the bill from time to time, until sufficient effects were received from the estate of the testator, it was held that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3,000*l.* to trustees for her own use, in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance: *Bowerbank* v. *Monteiro*, 4 Taunt. 844. Where a bill is endorsed to a person as executor, and he again endorses it, he becomes personally liable, unless he endorses it in such terms as to negative personal liability: Bills of Exchange Act (45 & 46 Vict. c. 61), s. 31 (5). See sect. 16 (1) as to endorsements limiting or negativing liability. And by sect. 26 (1) of this Act, it is enacted that where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, *or in a representative character*, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, *or as filling a representative character*, does not exempt him from personal liability. See *King* v. *Thom*, 1 T. R. 489; *Alexander* v. *Sizer*, L. R. 4 Ex. 102.

(*n*) *Forth* v. *Stanton*, 1 Saund. 210.

(*o*) *Pitt* v. *Bridgwater*, 1 Roll. Abr. 20, pl. 11; *Russel* v. *Haddock*, 1 Lev. 188; 1 Saund. 210, note (1).

(*p*) *Reynolds* v. *Prosser*, Hardr. 71; *Oble* v. *Dittlesfield*, 1 Ventr. 153; 1 Saund. 210, note (1).

plaintiff would deliver to her six barrels of beer, promised to pay to the plaintiff, as well the 50*l.* due by the intestate, as for the six barrels delivered to herself, and that he thereupon delivered the six barrels; it was held that the action was well brought against her on her own *assumpsit*, and that the judgment should be for both debts *de bonis propriis* (*q*).

So where an attorney delivered up deeds to an executor, which he was not obliged to do till the bill was paid, and these deeds were of great use to the executor in several suits which were then being carried on; it was held, that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not (*r*).

It would seem that the having assets is a good consideration for a promise by an executor or administrator to pay a debt of the deceased, or to answer damages out of the executor's own estate: Thus in *Reech* v. *Kennegal* (*s*), Lord Hardwicke observed, "At law, if an executor promises to pay the debt of his testator, a consideration must be alleged: *as of assets come to his hands;* or of forbearance; *or if an admission of assets* is implied by the promise; otherwise it will be but *nudum pactum*, and not personally binding upon the executor." So it was held in *Atkins* v. *Hill* (*t*) and in *Hawkes* v. *Saunders* (*u*), that the circumstance of the executor having assets sufficient to pay all the debts and legacies, was a sufficient consideration to support a promise to pay a legacy, so as to render the executor individually liable on that promise in an action at law (*x*): And although he doctrine of these cases, as far as the liability of an executor to be sued at law for a general legacy, has been since exploded (*y*), yet it would seem that their authority, with respect to the sufficiency of the consideration in question to support a promise to pay debts, remains unimpeached. The consequence is, that if an executor or administrator promises, in writing, that, in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise

(*q*) *Wheeler* v. *Collier*, Cro. Eliz. 406.

(*r*) *Hamilton* v. *Incledon*, 4 Bro. P. C. 4, Toml. edit.

(*s*) 1 Ves. Sen. 126.

(*t*) Cowp. 284.

(*u*) Cowp. 289.

(*x*) See also accord. *Barnard* v. *Pumfrett*, 5 M. & Cr. 71, *per* Lord Cottenham.

(*y*) See *post*, p. 1566.

in his individual capacity, and the judgment against him will be *de bonis propriis* (*z*).

It may here be observed, that in cases like the above mentioned, where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as promising *as executor* (*a*).

what is a sufficient reduction of the executor's promise into writing.

It remains to consider 2ndly, What is a sufficient reduction into writing of the promise of an executor or administrator. The fourth section of the Statute of Frauds (29 Car. II. c. 3), enacts (*inter alia*) that "no action shall be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise to answer for the debt, default or miscarriage of another person, &c., &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing* and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The word "agreement" used in this section means the *consideration* of the promise (*b*): and, therefore, it was held in the case of *Wain* v. *Warlters* (*c*), that the *consideration* of the promise, as well as the promise itself, must be in writing, otherwise it is void: This doctrine was very much doubted in several subsequent cases, but was fully established by subsequent decisions (*d*). It was, however, sufficient, if the consideration could be gathered from the whole tenor of the writing; and it was held that it was not necessary that it should be stated on the face of it in express terms (*e*). This rule having proved a grievance, it was enacted by stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), s. 3, that no special promise *to answer for the debt, default, or miscarriage of another person*, shall be deemed invalid, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.

(*z*) *Trewinian* v. *Howell*, Cro. Eliz. 91. And see *Rann* v. *Hughes*, 7 Term Rep. 350, note (*a*).

(*a*) *Powell* v. *Graham*, 7 Taunt. 585; *Wigley* v. *Ashton*, 3 B. & A. 101; *Corner* v. *Shew*, 3 M. & W. 350.

(*b*) 1 Saund. 211, note (2).

(*c*) 5 East, 10.

(*d*) *Saunders* v. *Wakefield*, 4 Barn. & Ald. 595; 1 Saund. 211, note (*d*).

(*e*) 1 Saund. 211, note (*d*).

Personal responsibility of executor on a submission to arbitration.

This may be the proper place to consider how far an executor or administrator is liable upon a submission to arbitration of a claim upon him as the representative of the deceased. Where the executor submits in broad terms, to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not (*f*): For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission (*g*). Thus in *Barry* v. *Rush* (*h*), an action of debt was brought on a bond given by the defendant, by which he, as administrator, bound himself, his heirs, &c.: The condition, after reciting that the plaintiff and defendant had agreed to submit to arbitration certain disputes which had arisen between the plaintiff and the defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator, was for the performance of an award to be made by the arbitrators concerning the matters assigned, and also concerning all other matters, &c., between the said parties: The declaration stated, that the arbitrator had awarded that the defendant, as administrator, should pay to the plaintiff, as executrix, 298*l.* on the 27th June following, and that the parties should execute general releases: The defendant pleaded *plene administravit*, and that at the time of entering into the bond, he had no assets: To this plea there was a demurrer: And the Court of King's Bench held that the plea was bad; on the ground that the bond was a personal engagement by the defendant to perform the award. So in *Worthington* v. *Barlow* (*i*), where the arbitrator, under a reference between A., a claimant on the estate of an intestate, and B., the administratrix, ascertained the amount of the demand, and directed that B. should pay it; it was held that B. could not afterwards object that he had no assets, but that he might be attached for nonpayment: And Lord Kenyon said, "The submission to arbitration by the administratrix, was a reference not only of the cause of action, but also of the other question whether or not the administratrix had assets. And as the arbi-

(*f*) See Lord Kenyon's judgment, in *Pearson* v. *Henry*, 5 Term Rep. 7.

(*g*) By Lord Eldon, in *Robson* v. ——, 2 Rose, 50. See also *Wansborough* v. *Dyer*, 2 Chitt. Rep. 40.

(*h*) 1 Term Rep. 691.

(*i*) 7 Term Rep. 453.

trator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining, between these parties, that the administratrix had assets to pay this debt. The defendant, therefore, is concluded by the award, though it will not operate as an admission of assets in any other action to be brought by any other creditor." So in *Riddell* v. *Sutton* (*k*), an administratrix referred to the final award of an arbitrator certain disputes between the plaintiff and herself as executrix, to be finally settled by the said arbitration: The arbitrator found a balance due from the defendant to the plaintiff, and without finding assets, awarded her to pay it on or before a certain day: And the Court of Common Pleas held that *plene administravit* was no bar to an action on the award. It would seem, however, that on a general reference an arbitrator is not justified in rejecting evidence offered by the executor to show that he has no assets to meet the demand upon his testator's estate (*l*).

But the personal liability of the executor or administrator may obviously depend not only on the terms of the submission, but also on those of the award. Thus in *Pearson* v. *Henry* (*m*), the defendant, as administrator, submitted to an award, and the arbitrator awarded that a certain sum was due from the intestate's estate, *without awarding that the administrator was to pay it:* And it was held that the administrator was not thereby precluded from denying that he had assets (*n*). So in *Love* v. *Honeybourne* (*o*), a cause and all matters in difference between the plaintiff's testator and the defendant were referred to arbitration by a Judge's order, and the arbitrator, upon an investigation of the accounts, ascertained that there was a certain balance against the testator, and, by his award, directed the plaintiff to pay that sum *out of the assets*, on or before a certain day: The Court was moved to set aside this award for uncertainty, on the ground that the arbitrator had not ascertained whether there were any assets in the hands of the executor to pay the sum awarded: The Court refused to set aside the award, on the ground that although in that respect it might be uncertain, yet that would not vitiate the other part of the award, which was unquestionably certain, namely, that part

(*k*) 5 Bing. 200.

(*l*) Russell on Arbitration and Award, 8th edit., p. 131.

(*m*) 5 T. R. 6.

(*n*) See *Worthington* v. *Barlow*, 7 T. R. 453.

(*o*) 4 Dowl. & Ryl. 814.

which found that the plaintiff, as executor, was indebted, upon a balance of accounts, to the defendant: But Lord Tenterden observed, that it appeared to him, that the latter part of the award did not conclude the question of assets, but left it open: And Holroyd, J., remarked that the arbitrator had awarded that the money should be paid by the plaintiff out of the assets upon a day which he fixed, *i.e.*, if there were any assets in his hands at that time; and that if the plaintiff had fully administered at that time, he would not be bound to pay (*p*).

Liability of executor for acts done under his power of attorney.

It was held by the Court of K. B. in *Gardner* v. *Baillie* (*q*), that a power of attorney from an executor, to ask, demand, sue for and receive all sums due to him as executor, and to do all further acts for receiving debts, &c., with power to do and act touching the premises as effectually as the principal could do, does not authorise the attorney to bind his principal, by accepting bills for debts due from his testator. But in *Howard* v. *Baillie* (*r*), the Court of Common Pleas inclined to hold, that a letter of attorney given by an executor to A., enabling him to transact the affairs of the testator, in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due from the testator, conveyed a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable: And clearly, if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill; without resorting to the letter of attorney (*s*).

Liability of executor with respect to the expenses of the funeral.

With respect to the liability of an executor or an administrator for the expenses of the funeral of the deceased, it appears to be clear, that if an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party, who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses (*t*). And notwithstanding that, generally

(*p*) See also *Re Joseph and Webster*, 1 Russ. & M. 486.

(*q*) 6 T. R. 591.

(*r*) 2 H. Black. 618. (*s*) *Ibid.*

(*t*) *Brice* v. *Wilson*, 8 A. & E. 349, note (*c*); *Corner* v. *Shew*, 3 M. & W. 350. As to the duties of the executor or administrator in respect of the funeral, see *ante*, p. 736.

speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained (*u*), yet it would seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given for the funeral of the deceased, he will be thereby bound, after he has become administrator (*x*), to satisfy the charges incurred under such orders (*y*).

Where executor or administrator has neither given nor adopted directions for burial.

A question, however, of some difficulty arises, in cases where the executor or administrator has neither given nor adopted any directions for the burial, but he is sought to be charged on an implied contract arising out of his situation, with reference to his character and the estate of the deceased. According to one report of the case of *Ashton* v. *Sherman* (*z*), Lord Holt laid it down that "if A. employs B. to work for C., without warrant from C., A. is liable to pay for it: an executor is not liable to pay for funeral expenses unless he contracts for it." This *dictum* is not mentioned by the other reporters (*a*) of the same case; and, indeed, from the nature of the facts, it is difficult to see how the remark could have been introduced into the discussion: But an anonymous case is to be found in the twelfth volume of Modern Reports (*b*), which contains the mere statement that "an executor is not liable to pay for funeral expenses, without he contracts for it:" And this probably is but a reference to the *dictum* of Lord Holt, inserted in the report of *Ashton* v. *Sherman*. Recent decisions, although the propriety of them has been much questioned (*c*), must be considered as having overruled this doctrine: and it seems now established, that in the absence of evidence to charge any other individual, an executor *with assets* is answerable in point of law without

Executor with assets liable without any express contract to pay

(*u*) See *ante*, p. 314 *et seq.*

(*x*) But the estate of a deceased person is not liable on a contract made by a person, although for the benefit of the estate, unless that person, by subsequently obtaining letters of administration, becomes authorised to bind the estate, and ratifies the contract: *Re Watson*, 18 Q. B. D. 116; 19 Q. B. D. 234. See *ante*, pp. 468, 469.

(*y*) *Lucy* v. *Walrond*, 3 Bing. N. C. 841. In this case, the action was sustained against the defendant in his character *as administrator;* but the point, as to whether he could be properly sued otherwise than individually, was precluded by the circumstances of the defendant having paid money into Court.

(*z*) Holt, 309.

(*a*) 1 Lord Raym. 263; Carth. 429; 12 Mod. 153; Comberb. 444, 449.

(*b*) P. 256.

(*c*) See *Corner* v. *Shew*, 3 M. & W. 356.

for funeral expenses in absence of evidence to charge any other person.

any express contract, for the funeral expenses of his testator, suitable to his degree (*d*). Thus in *Tugwell* v. *Heyman* (*e*), Lord Ellenborough held, that if executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. So in *Rogers* v. *Price* (*f*), it appeared that the testator died in Wales, at the house of his brother, who thereupon sent for the plaintiff, an undertaker residing at a distance: The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner: It was admitted that the funeral was suitable to the degree of the deceased: There was no evidence of any contract made by the defendant, or that he knew of the funeral until it had taken place: But the Court of Exchequer held that, assuming him to have assets, he was liable, upon an implied promise, to pay the expenses of the burial.

However, it was stated by Patteson, J., in *Brice* v. *Wilson* (*g*), that, "it has been decided by several cases that an executor is liable upon an implied promise, at common law, to pay reasonable expenses for the funeral of his testator, *where no other person is liable upon an express contract*, although he does not give orders for it: But there is no case which goes the length of deciding that if the funeral be ordered by another person to whom credit is given, the executor is liable:" In that case the testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant: The undertaker, in his bill, charged the widow, but subsequently applied for payment to

(*d*) See the remark of Bayley, J., in *Hancock* v. *Podmore*, 1 Barn. & Adol. 262; and of Jervis, C. J., in *Ambrose* v. *Kerrison*, 10 C. B. 779. And Sir G. Jessel, in *Sharp* v. *Lush*, 10 C. D. 468, 472, said: "It appears to me that the executor is liable to pay the funeral expenses, even without an order on his part, if he has any assets available for the purpose; and it has also been decided that the funeral expenses are a first charge on the assets. Even *if the executor never receives assets* to the amount of the funeral expenses, he is liable to pay, although he did not order the funeral. It is part of his official duty to bury the deceased, so that he is liable to pay the funeral expenses without an order." See also *Williams* v. *Williams*, 20 C. D. 659.

(*e*) 3 Campb. 298.

(*f*) 3 Younge & Jerv. 28.

(*g*) 8 A. & E. 349, note (*c*).

the executor, who promised to pay: An action was brought against the executor in his own right, in which he suffered judgment by default: And it was held that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow; not, it must be observed, on the ground of a common law liability of the defendant as executor, but on the ground of his having rendered himself liable by adopting the acts of the widow, and treating her as his agent (*h*). But the learned judge, in this case, probably intended to lay down no more than that the executor, where credit has been given to another person, is not liable to *the undertaker;* for it would seem, that if the person, who gives the order for the funeral, pays for it, he may have an action against the executor for the reasonable expenses: Accordingly, it was held in *Green* v. *Salmon* (*i*), that in an action (brought before Lord Denman's Act, making interested witnesses competent) by an undertaker for funeral expenses, against a person not the executor, a residuary legatee was a competent witness for the plaintiff: For although a person, other than the executor, might have rendered himself liable to the undertaker, the estate was ultimately answerable for so much of the cost as an executor might reasonably pay, and no more; and the witness, therefore, had no disqualifying interest (*k*).

These authorities do not involve the decision of the question whether, in an action on the promise implied by law on the part of an executor to pay for the funeral of his testator, the judgment should be *de bonis propriis* or *de bonis testatoris*, or consequently whether *plene administravit* is a good plea: It would seem, however, that the naming the defendant executor in the claim is surplusage, and that he is liable *de bonis propriis*, if liable at all (*l*): but that, since the maintenance of the action is dependent on the fact of his being an executor *with assets*, it is a good defence under the general issue that his testator left none. And accordingly, in *Corner* v. *Shew* (*m*), the Court of Exchequer held, that the only point really determined, by *Tugwell* v. *Hey-*

(*h*) See *Walker* v. *Taylor*, 6 C. & P. 752.

(*i*) 8 A. & E. 348.

(*k*) But an heir-at-law who has voluntarily, and as an act of bounty, paid the funeral expenses of an intestate cannot claim to have them refunded out of the intestate's personal estate: *Coleby* v. *Coleby*, 12 Jur. N. S. 496, *coram* Stuart, V.-C.

(*l*) See *Hayter* v. *Moat*, 2 M. & W. 56.

(*m*) 3 M. & W. 350.

man and *Rogers* v. *Price*, was that the law implies a contract on the part of an executor who has assets *personally*, and not in his *representative character;* inasmuch as the implied promise cannot place the defendant in a different condition than if he had made an express contract to the same effect; which certainly would have bound him personally only.

Liability of executor continuing the trade of testator.

With respect to the liability of an executor or administrator carrying on the trade of the deceased, the general principle is, that a trade is not transmissible, but is put an end to by the death of the trader: Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the Will contains a direction that they should continue the business of the deceased (*n*). The case of an executor or administrator, in this respect, is very hard: For, if the trade be beneficial, the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success: If, on the contrary, the trade prove a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also, in his person; and he may be proceeded against as a bankrupt though he is but a trustee (*o*). Accordingly, in a case (*p*) where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, the Court of K. B. held, that they were liable upon a bill drawn for the accommodation of the partnership and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves (*q*).

(*n*) *Barker* v. *Barker*, 1 T. R. 295; *Ex parte Garland*, 10 Ves. 119. As to the duty of the executor or administrator with regard to the business of the deceased, see *post*, p. 1554.

(*o*) *Ex parte Garland*, 10 Ves. 119; *Ex parte Richardson*, 1 Buck, 209; *Owen* v. *Delamere*, L. R. 15 Eq. 134; *Fairland* v. *Percy*, L. R. 3 P. & D. 217. As to the remedy of a creditor of the business, see *post*, p. 1634.

(*p*) *Wightman* v. *Townroe*, 1 M. & S. 412.

(*q*) See also accord. *Labouchere* v. *Tupper*, 11 Moo. P. C. 198; in which case Lord Justice Knight

It is therefore obvious, that where partners covenant that they and their respective executors and administrators will continue partners for a certain term of years, and one of them dies before the term has expired, his executors or administrators cannot be compelled to become partners personally (*r*), though the covenant is binding on the estate of the deceased partner in their hands (*s*).

If an executor, without any authority from the Will (*t*), take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests: and with respect to such of the assets as can be specifically distinguished to be a part

Bruce further laid down that the executor is personally liable, as above stated, though he carries on the trade avowedly as executor, and whether he is entitled or not entitled to be indemnified out of the testator's personal estate, and whether it is sufficient or insufficient for the purpose, and notwithstanding the testator was bound by a covenant with his partner to continue the trade in partnership. His Lordship also pointed out that the propriety of his executor's conduct, as between himself and those beneficially interested in the testator's personal estate, cannot give the creditors of the trade, becoming so after the death, the rights of creditors of the testator. See further *Re Leeds Banking Company*, L. R. 1 Ch. 231. If a firm in which the Will authorized the employment of the assets becomes bankrupt, no proof can be made against the bankrupt estate in respect of the money so employed: *Scott* v. *Izon*, 34 B. 434.

(*r*) *Downs* v. *Collins*, 6 Hare, 418, 438. See *per* James, L. J., in *Baird's Case*, L. R. 5 Ch. 733; *ante*, p. 1281, note (*o*).

(*s*) *Ibid.* See also *ante*, p. 1379 *et seq.*, as to the executors of deceased shareholders in Public Companies. If such an executor purchases further shares, he is, of course, personally liable in respect of these: *Spence's Case*, 17 Beav. 203.

(*t*) In *Kirkman* v. *Booth*, 11 Beav. 273, 280, Lord Langdale said it was a rule without exception that, to authorize executors to carry on a trade, or permit it to be carried on with the assets, there ought to be the most distinct and positive authority and direction given by the Will for that purpose. See further as to what shall constitute such an authority and direction, *Travis* v. *Milne*, 9 Hare, 141. A power to postpone the sale and conversion of the testator's estate will authorize executors to carry on his trade for any time even if it is not carried on with a view to a sale: *Re Crowther*, [1895] 2 Ch. 56. But see *Re Smith*, [1896] 1 Ch. 171, where a general power to postpone sale, but with a direction to sell business with all convenient speed, was held not to authorize the carrying on the business for an indefinite time.

of the testator's estate, they will not pass to the assignees; the executor holding them *alieno jure*, they will not be liable to his bankruptcy (*u*).

Again, the testator may, by his Will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation (*x*). Accordingly, in *Cutbush* v. *Cutbush* (*y*), where a testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and for that purpose gave her the "entire use, disposal, and management of the capital, stock, and effects which should be in, due, and owing, or belonging to him in his said trade," at the time of his decease, and he authorized his executors to augment the capital employed therein: and, the executors renouncing, the widow took out administration: Lord Langdale, M. R., held that the specified property of the testator only (and not his general assets) was liable to the debts contracted by the widow in carrying on the trade (*z*).

It must be observed, that when the law speaks of executors not carrying on the business of their testator, it means, that they are not to buy and sell: There are many cases, when executors not only may, but are bound to continue the business to a certain extent: Thus if a party contracts for himself and his executors to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work (*a*). So if a party engages to build a house, and dies, after having procured all the necessary materials, it would seem that his executors ought to complete the work, and not dispose of

(*u*) *Ex parte Garland*, 10 Ves. 110; Toller, 487; *Ex parte Richardson*, 1 Buck, 202; *ante*, p. 475.

(*x*) *Ex parte Garland*, 10 Ves. 110; Toller, 487; *Ex parte Richardson*, 1 Buck, 202; *Thompson* v. *Andrews*, 1 M. & K. 116.

(*y*) 1 Beav. 184.

(*z*) A direction in a Will that the testator's trade shall be carried on does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction coupled with a direction that the testator's debts shall be paid authorize a mortgage of his real estate, not employed at his death in the trade, for the purposes of carrying it on: *M'Neillie* v. *Acton*, 4 De G. M. & G. 744.

(*a*) *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; *ante*, p. 1349.

the materials at a loss to the estate (*b*). Again, if a bookseller undertakes to publish a work in parts, and before the completion he dies, a subscriber has a claim upon the estate to complete the work; for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless: So if a man makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state (*c*). So if the deceased died possessed of a manufactory, his executors, it should seem, would be justified in continuing the works for a reasonable time, if this should be requisite for the purpose of selling the machinery and premises to advantage; and they will not, at least in equity, be charged with any loss sustained in employing the assets in so continuing the trade, if they act *bonâ fide*, and according to the best of their judgment (*d*).

It may here be mentioned, that if executors, who are by the testator's Will to carry on his trade for the benefit of his family, suffer a person to conduct the trade in his own name, such person may bring actions in his own name for goods sold by him, though afterwards accountable to the executors (*e*).

In *Sterndale* v. *Hankinson* (*f*), the facts were, that A., the widow and administratrix of B., continued B.'s trade after his decease: B., at his death, was indebted to C. on the balance of an account: A. continued to receive goods from and to make payments to C. as B. had done, and she was charged in account by C. with the debt: The payments made by her to C. exceeded the debt; but a balance was ultimately due to C.; And it was held, applying the principle of appropriation of payments laid down in *Clayton's Case* (*g*), that B.'s debt was discharged by A.'s payments, and that the ultimate balance could not be proved as a debt against B.'s estate.

(*b*) 1 Cr. & J. 405. See also *Edwards* v. *Grace*, 2 M. & W. 190.

(*c*) 1 Cr. & J. 405. See *Dakin* v. *Cope*, 2 Russ. Ch. C. 170.

(*d*) *Garrett* v. *Noble*, 6 Sim. 504. See also accord. *Collinson* v. *Lister*, 20 Beav. 356, 365, 366, by Romilly, M. R.

(*e*) *Wilkes* v. *Lister*, 6 Esp. 78.

(*f*) 1 Sim. 393.

(*g*) 1 Mer. 572.

SECTION II.

Of the Liability of an Executor or Administrator in respect of his own tortious or negligent Acts: and herewith of Devastavit; and of Executors' Accounts and Allowances.

It remains to investigate what will amount to such a violation or neglect of duty by an executor or administrator, as will make him personally responsible.

Devastavit.

This species of misconduct is called in law a *devastavit:* that is, a wasting of the assets; and is defined to be a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased (*h*).

Executor liable for breach of trusts arising from office. Probate by executors is an acceptance of trusts in Will.

An executor is personally liable in equity for all breaches of the ordinary trusts which, in Courts of Equity, are considered to arise from his office (*i*). And it may here be observed, that where personal property is bequeathed to executors, as trustees, the circumstance of taking probate of the Will (*k*) is, in itself, an acceptance of the particular trusts: Therefore, where the Will contains express directions what the executors are to do, an executor, who proves the Will, must do all that he is directed to do as executor, and he cannot say, that, though executor, he is

(*h*) Bac. Abr. Exors. (I.) 1.

(*i*) *Re Marsden*, 26 C. D. 783, 789.

(*k*) And where probate is granted to one of several executors, the right of the others being reserved, it enures to the benefit of all, and a slight act of intermeddling by the executor, who has not joined in proving the Will, will amount to the acceptance of the office of executor: *Cummins* v. *Cummins*, 3 J. & L. 64; 8 Ir. Eq. Rep. 723. And where one appointed executor intermeddled with the estate of the testator and afterwards renounced, it was held that he was liable to be sued in equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will: *Rogers* v. *Frank*, 1 Y. & J. 409. So, too, where two out of three executors proved the Will, and the third, who did not prove, administered part of the assets, and, as purchaser, paid the purchase-money of the stock in trade to one of the other two executors who misapplied the money, it was held that he was liable as executor, being by his conduct completely executor: *Kilbee* v. *Sneyd*, 2 Moll. 186.

not clothed with any of those trusts (*l*). Moreover, an executor-trustee of English and foreign property cannot disclaim the trusts of the English property while retaining control over the foreign property (*m*).

The general rule adopted, with respect to the liability of executors and administrators on this head, is founded upon two principles: 1st, That in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight ground: 2nd, That care must be taken to guard against an abuse of their trust (*n*).

Executors and administrators may be guilty of a *devastavit* not only by a direct abuse of the effects of the deceased, as by spending or consuming, or converting them to their own use (*o*), but also by such acts of negligence and wrong administration, as will disappoint the claimants on the assets (*p*).

Devastavit by direct acts of abuse:

With respect to incurring the charge by plain and palpable acts of abuse, an example of this sort of *devastavit* may be afforded by recurring to a subject already considered: *viz.*, the application of the assets to the satisfaction of the executor's own debt to a third party (*q*). So where the executor collusively sells the testator's goods at an under-value, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the real value (*r*).

(*l*) *Mucklow* v. *Fuller*, Jacob. 198; *Booth* v. *Booth*, 1 Beav. 125; *Stiles* v. *Guy*, 4 Y. & Coll. 571, 575; *Williams* v. *Nixon*, 2 Beav. 472. But where the same persons are appointed trustees and executors of a Will, a revocation by the testator of their appointment as executors is not necessarily a revocation of their appointment as trustees: *Graham* v. *Graham*, 16 Beav. 550; *Cartwright* v. *Shepheard*, 17 Beav. 301; *Worley* v. *Worley*, 18 Beav. 58.

(*m*) *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228.

(*n*) *Powell* v. *Evans*, 5 Ves. 843; *Raphael* v. *Boehm*, 13 Ves. 410; *Tebbs* v. *Carpenter*, 1 Madd. 298.

(*o*) A disposing of the goods of the testator to the executor's own use is no *devastavit*, if he pays the testator's debts to the value, with his own money, in such order as the law appoints: *Merchant* v. *Driver*, 1 Saund. 307; Com. Dig. Admon. (I. 2); *ante*, p. 482. No action will lie for neglect to take out probate, though such neglect has been followed by loss, *per* Vaughan Williams, L. J., in *Re Stevens*, [1898] 1 Ch. 162, 177.

(*p*) Bac. Abr. Exors. (L.) 1.

(*q*) See *ante*, p. 704.

(*r*) Wentw. Off. Ex. 302, 14th edit.; Bac. Abr. Exors. (L.) 1; *Rice* v. *Gordon*, 11 Beav. 265.

by mal-administration.

With regard to a *devastavit* arising from the mal-administration of the executor or administrator, the charge will be incurred by misapplying the assets in undue expenses for the funeral (*s*); in the payment of debts out of their legal order, to the prejudice of such as are superior (*t*); or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors (*u*).

Devastavit in paying debts of inferior degree before debts of superior degree.

As to distribution of assets of testator or intestate after notice given by executor or administrator.

It is not, however, a *devastavit* in an executor or administrator to pay a debt of an inferior degree, before one of higher, *of which he had no notice* (*x*). The modern authorities appear to establish that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse the executor from the payment or satisfaction of it, if the assets were originally sufficient for that purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he may have handed over the assets *bonâ fide* to legatees or parties entitled in distribution. But an executor or administrator can now protect himself by taking the proper steps, under stat. 22 & 23 Vict. c. 35, sect. 29 (*y*).

If the executor surrenders, or otherwise fails to preserve the residue of a term of years, where the land is of greater yearly value than the rent, it is a *devastavit* (*z*). On the other hand, if the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a *devastavit* in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease by assigning it to some other person (*a*). If a term be assigned by an executor in trust to attend the inheritance, he is liable to the creditors for a *devastavit;* for the term has by this means ceased to be assets at law (*b*).

(*s*) *Ante*, p. 737 *et seq.*

(*t*) *Ante*, p. 753 *et seq.* But if the executor pays an inferior debt with his own money, though it be to the value of the testator's goods in his hands, it would seem that it will not be a *devastavit:* for the property of the assets will not be changed thereby, but they remain, as against a creditor of a debt of a superior degree, in the same plight as they were before: Com. Dig. Admon. (I. 2); *Wheatley* v. *Lane*, 1 Saund. 218, by Pemberton, *arguendo.*

(*u*) *Ante*, p. 1078.

(*x*) See *ante*, p. 779.

(*y*) See *ante*, p. 1083.

(*z*) Wentw. Off. Ex. c. 13, p. 312, 14th edit.; *Thompson* v. *Thompson*, 9 Price, 476.

(*a*) *Rowley* v. *Adams*, 4 M. & Cr. 534, *ante*, p. 1385, note (*y*).

(*b*) *Charlton* v. *Low*, 3 P. Wms.

The law formerly pressed very hardly on executors and administrators who, in the exercise of an honest discretion, released or compounded debts due to the testator or intestate. The hardship has been much mitigated by legislation, first by Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 30, then by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which repealed the above-mentioned section of Lord Cranworth's Act, and by sect. 37 afforded a still larger relief to executors, but did not extend to administrators (*c*), and, lastly, by the Trustee Act, 1893 (56 & 57 Vict. c. 53), by the 21st section of which it is enacted that—

Distinction between executors and administrators as to releasing or compounding debts.

"(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient."

Executor or administrator may now compound or release debts. 56 & 57 Vict. c. 53, s. 21.

"(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise (*d*), compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith."

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained."

"(4.) This section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of this Act."

This legislation renders the old cases valueless.

330. As to terms attendant on the inheritance of the testator, see *ante*, p. 1296.

(*c*) *Re Clay and Tetley*, 16 C. D. 3.

(*d*) An executor may, in a proper case, compromise a claim by his co-executor against the estate, and such a compromise will bind the residuary legatees: *Re Houghton*, [1904] 1 Ch. 622. See *ante*, p. 397, note (*g*).

Devastavit by unnecessary payments:

An executor will be guilty of a *devastavit*, if he applies the assets in payment of a claim which he is not bound to satisfy (*e*): as if he makes disbursements in the schooling, feeding, or clothing of the children of the deceased, subsequently to his decease (*f*). But executors must be allowed a reasonable time for breaking up a testator's domestic establishment and discharging his servants (*g*). Again, where the testator had been attended for many years by a physician without any fees, and the executors had paid him 100*l.*, and he had stated in an affidavit, that the testator had promised to pay him for his services or leave him an equivalent, it was held, that as the physician could not have claimed himself as for a legal debt, the executors, who had taken on themselves to pay him, stood in the same situation as he did; and the payment thereof could not be allowed (*h*). So if an executor pays a bond *ex turpi causâ* or, formerly, a bond founded on a usurious contract, such payment will amount to a *devastavit*, as well against legatees as creditors (*i*). So if the testator was bound in a *joint* obligation, and he dies before the co-obligor, the executor is not liable on the instrument, and therefore if he pays the sum due upon it,

(*e*) Com. Dig. Admon. (I. 1); *Manning* v. *Purcell*, 7 De G. M. & G. 55; *Vez* v. *Emery*, 5 Ves. 141. In this last case, Lord Alvanley said, that if the executor had taken advice as to the propriety of making the payment, and had been advised by any gentleman of the law in this country, that he was bound to do so, he (the learned Judge) would not have held him liable. However, the general rule is, that, if, under the best advice he can procure, an executor acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer: if he has been misadvised, the Court must act, not upon the improper advice under which he may have acted, but upon the acts he has done: *Doyle* v. *Blake*, 2 Sch. & Lef. 243.

(*f*) *Giles* v. *Dyson*, 1 Stark. N. P. C. 32.

(*g*) *Field* v. *Peckett*, 29 Beav. 576, where two months was held not to have been an unreasonable time having regard to the circumstances.

(*h*) *Shallcross* v. *Wright*, 12 Beav. 558. Such a case, however, would now be within s. 21 of the Trustee Act, 1893: see *ante*, p. 1437. In the same case, a payment was allowed which the executors had made in respect of the loss of the furniture of the house of a friend where the testator had died of malignant fever, and which had been destroyed, under medical advice, to prevent infection. As to the liability of an executor to pay for work done or services rendered *under the expectation* of a legacy, see *ante*, p. 1408.

(*i*) *Winchcombe* v. *Bishop of Winchester*, Hobart, 167; *Robinson* v. *Gee*, 1 Ves. Sen. 254; Com. Dig. Admon. (I. 1), *ante*, p. 773.

he will be guilty of a *devastavit* (*k*): However, in equity, the executor is in some instances chargeable *pari passu* with the survivor; and in such cases he is justified in applying the assets accordingly (*l*). But an executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations (*m*). Again, it has been held that he is not bound to plead the statute to an action commenced against him by a creditor of the testator (*n*): Thus if the surplus of the personal estate, after payment of the debts and legacies, be bequeathed to a residuary legatee, and several creditors, although barred by the Statute of Limitations, commence actions against the executor, equity will not, on his refusal to plead the statute, compel him to plead it in favour of the residuary legatee (*o*). So in the administration of assets under a creditor's bill, it was held, that executors were not bound to plead the statute; and if they did not, the creditor filing the bill would have a decree on behalf of himself and all other creditors, and would be paid (*p*). And accordingly, on a creditor's administration summons, if the executor does not set up the statute, the residuary legatees cannot set it up against the plaintiff, whatever may be their right as to other creditors (*q*). But in *Shewen* v.

effect of Statute of Limitations:

executor not bound to plead the statute:

(*k*) *Ante*, p. 1367.

(*l*) *Ante*, p. 1357.

(*m*) *Norton* v. *Frecker*, 1 Atk. 526, by Lord Hardwicke; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415. The reason for this is that the Statute of Limitations does not make the contract void, but only bars the remedy. Whereas an executor or administrator would commit a *devastavit* if he paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds, or if he retains such a debt due to himself: *Re Rownson*, 29 C. D. 358. An executor may not, however, pay a debt which has been judicially declared to be barred by the Statute of Limitations: *Midgley* v. *Midgley*, [1893] 3 Ch. 282. It seems doubtful whether an executor may pay a statute-barred debt against the declared wish of his co-executors: *S. C.* An acknowledgment of a debt within Lord Tenterden's Act by one of several executors, as executor, binds the estate, even after his death: *Re Macdonald*, [1897] 2 Ch. 181.

(*n*) *Williamson* v. *Naylor*, 3 Y. & Coll. 211, note (*a*), by Lord Lyndhurst. But see *contrà*, by Bayley, J., in *McCulloch* v. *Dawes*, 9 D. & R. 43. This dictum of the latter judge was disapproved by Wood, V.-C., in *Hill* v. *Walker*, 4 Kay & J. 166; *Lowis* v. *Rumney*, L. R. 4 Eq. 451.

(*o*) *Castleton* v. *Fanshaw*, Prec. Ch. 100; *S. C.*, 1 Eq. Cas. Abr. 305; 2 Eq. Cas. Abr. 254, 259, pl. 1. But see *Re Wenham*, [1892] 3 Ch. 59, *post*, p. 1441.

(*p*) *Ex parte Dewdney*, 15 Ves. 498.

(*q*) *Briggs* v. *Wilson*, 5 De G. M. & G. 12. See also *Fuller* v. *Redman*, 26 Beav. 614.

Vandenhorst (*r*), under the common decree in an administration suit, where the bill had been filed, and the decree obtained, by the residuary legatee, a creditor applied to prove a debt which was barred by lapse of time; and the executor refusing to interfere, the plaintiff insisted upon setting up the objection of the statute: Sir John Leach, M. R., held, that it was competent for the plaintiff, or any other person interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executor: And this decision was confirmed by Lord Brougham on appeal (*s*). And even on a creditor's administration summons, the *cestuis que trustent* of devised estates may set up the statute against him, though the executor should decline to do so; for they would have been necessary parties to the suit, but for the Chancery Amendment Act, and might have set up the statute by answer (*t*).

If an action is brought against several executors for the recovery of a debt due from their testator, and they plead different inconsistent pleas, that plea is to be enforced by the Court which is most for the benefit of the estate (*u*).

after order for administration executor cannot exercise his discretion.

After judgment or order for administration an executor cannot exercise any discretion at all or do any act to vary the rights of the parties, and he cannot therefore give an acknowledgment to take a debt out of the Statute of Limitations (*x*). But nothing short of an order for administration will prevent a creditor of the estate from suing the executor, or the executor from paying a debt due from the estate. An order in an administration action under Ord. XV. r. 1, merely for an account by an executrix, and reserving further consideration, does not affect the right of creditors to sue her or her right to prefer creditors (*y*). An originating summons under R. S. C., Ord. LV. r. 3, is, however, only a less expensive way of effecting the same

(*r*) 1 Russ. & M. 347; 2 Russ. & M. 75.

(*s*) See also *Moodie* v. *Bannister*, 4 Drewr. 432; *Fuller* v. *Redman*, 26 Beav. 614.

(*t*) *Briggs* v. *Wilson*, 5 De G. M. & G. 12. See also *Beeching* v. *Morphew*, 8 Hare, 129, where it was held, that in a creditor's bill against a husband and wife for a payment out of an estate of which the wife was administratrix, she alone might set up the statute in their joint answer. But where judgment has been recovered against an executor for a debt due by the testator, the statute cannot afterwards be set up in an administration suit: *Hunter* v. *Baxter*, 3 Giff. 214.

(*u*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

(*x*) *Phillips* v. *Beal*, 32 Beav. 26.

(*y*) *Re Barrett*, 43 C. D. 70.

thing as an administration action, and therefore where executors took out a summons asking for the determination, without administration of the estate, of the question whether the first defendant was a creditor upon the estate to any and (if so) what amount, the other defendant being the residuary legatee, it was held that the residuary legatee was entitled to insist on the statute being set up as a defence to the claim (*z*). But after decree in an administration suit, the Court is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by the statute if the personal representative and such of the persons beneficially interested as are parties to the suit or have come in under the decree do not set up the statute (*a*).

If before judgment or order it is desired to prevent waste, the Court will grant *interim* relief by appointing a receiver, but it will not interfere to prevent the executor or administrator preferring one creditor to another, nor to prevent the exercise of a right of retainer, nor in any case where it is not alleged that assets are being wasted (*b*).

Although it has been established as a general rule that an executor may pay a debt barred by the statute without being guilty of a *devastavit*, yet he may not pay such a debt after it has been judicially declared by the Court of competent jurisdiction that it is barred by the statute (*bb*).

Devastavit by negligence:

Such acts of negligence, or careless administration, as defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a *devastavit*. For if persons accept the trust of executors, they must perform it: they must use due diligence, and not suffer the estate to be injured by their neglect (*c*). Thus if an executor has a lease for years, determinable upon the life of A., which is upon a reasonable estimate

(*z*) *Re Wenham*, [1892] 3 Ch. 59.

(*a*) *Alsen* v. *Trellope*, L. R. 2 Eq. 205.

(*b*) *Re Wells*, 45 C. D. 569; and *ante*, p. 789. See also *per* Chitty, L. J., in *Re Stevens*, [1898] 1 Ch. 162, 173.

(*bb*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

(*c*) *Tebbs* v. *Carpenter*, 1 Madd. 298. See *Eaves* v. *Hickson*, 30 Beav. 136, where trustees were held liable who had paid over the trust fund to wrong persons, trusting to a forged marriage certificate. See also *Hopgood* v. *Parkin*, L. R. 11 Eq. 74, where a trustee was held liable for a loss of a trust fund, occasioned by the negligence of his solicitor. This case, however, was questioned by the Court of Appeal in *Speight* v. *Gaunt*, 22 C. D. 727.

worth 200*l.*, if the executor will not sell this but keeps it, and A. dies in a short time, yet the executor shall answer for the value of it at the time of the death of the testator; for it was his own fault that he would not sell it (*d*). So if an executor delays the payment of a debt payable on demand with interest, and suffers judgment for the principal and interest incurred after the testator's death, this is a *devastavit* for the interest, unless the executor can show that the assets were insufficient to discharge the debt immediately (*e*). And where the executor permits debts carrying interest at a specified rate to run on when he has in his hands a fund to pay them, he will be charged with interest at that rate (*f*).

in not paying debts carrying interest:

in not getting debts in.

Again, if the executor, by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a *devastavit* (*g*). So where the testator had lent out money on bond, and the executor in the course of several years made one application, by an attorney, to the obligor, but brought no action against him, Lord Thurlow held, that the executor should be liable for the sum due, as having not been got in by reason of his neglect, although it did not appear whether the debt was or was not recoverable (*h*). So where, for more than three years, the

(*d*) *Phillips* v. *Phillips*, 2 Freem. 12; *Taylor* v. *Tabrum*, 6 Sim. 281. See *ante*, p. 1291; *Fry* v. *Fry*, 27 Beav. 144. But see also *Selby* v. *Bowie*, 4 Giff. 300.

(*e*) *Seaman* v. *Everard*, 2 Lev. 40; Com. Dig. Admon. (I. 1); Bac. Abr. Exors. (L.) 1. So if an executor may save the penalty of a bond by payment of the less sum specified in the condition, or by other performance of the condition, and he neglect to do so, it will be a *devastavit* in him if he have assets: 1 Saund. 333, *a*, note (7) to *Hancock* v. *Prowd*.

(*f*) *Hall* v. *Hallet*, 1 Cox, 134, 138; *Dornford* v. *Dornford*, 12 Ves. 130, note (29), 2nd edit. See also *Bate* v. *Robins*, 32 Beav. 73. See *post*, p. 1488 *et seq.* as to charging executors with interest.

(*g*) By Holt, C. J., in *Hayward* v. *Kinsey*, 12 Mod. 573. But see *East* v. *East*, 5 Hare, 348.

(*h*) *Lowson* v. *Copeland*, 2 Bro. Ch. Cas. 156. In *Clack* v. *Holland*, 19 Beav. 271, 272, Romilly, M. R., said that where it is the duty of an executor to obtain payment of a sum of money, he is exonerated, though he has taken no steps at all, provided it appears that if he had done so, they would have been, or there is reasonable ground for believing they would have been, ineffectual. But in such a case it would seem that the onus is on the executor, to prove that, if he had taken proper measures to obtain payment, they would have failed: *Stiles* v. *Guy*, 16 Sim. 230; 1 Mac. & G. 422.

executors permitted money to remain due on bond to their testator, without inquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, Lord Alvanley held, that, on the obligor's becoming bankrupt, the executors were responsible (*i*). So where executors had suffered rent to be in arrear for several years, without taking any legal steps, by distress or otherwise, Sir Thomas Plumer held, that they should be charged with such arrears (*k*). And it was held by Lord Cottenham, that executors are equally chargeable with neglect in allowing a part of the assets to remain outstanding in an improper state of investment, whether the person in whose hands it is so outstanding be a co-executor or a stranger; and notwithstanding the Will contains the usual indemnity clause (*l*).

Devastavit by loss of the assets:

There has been occasion to discuss, in a previous part of this Work (*m*), the question of the liability of an executor or administrator, in respect of assets come fully into his possession and hands, and afterwards lost to the estate. It was there stated that an executor or administrator has been considered to stand in the condition of a gratuitous bailee, with respect to whom the law is, that he shall not be charged without some default in him. But this, as it appears from the judgment of Lord Ellenborough, in *Crosse* v. *Smith* (*n*), as the law then stood, must not be understood of the extent of the liability of an executor or administrator at law, but merely in equity: His Lordship there observed that it had been suggested in argument, that an executor was to be considered as a mere ordinary bailee; but that this was an idea probably then for the first time suggested in a Court of Law (*o*): "As no case in law," continued the learned Judge, "has yet decided that an executor once become fully responsible, by actual receipt of a part of his testator's property, for the due administration thereof, can

at law:

(*i*) *Powell* v. *Evans*, 5 Ves. 839. See also *Att.-Gen.* v. *Higham*, 2 Y. & Coll. Ch. C. 634, and *post*, p. 1457.

(*k*) *Tebbs* v. *Carpenter*, 1 Madd. 290. See *Buxton* v. *Buxton*, 1 Mylne & Cr. 95, by Sir C. Pepys, M. R., *post*, p. 1458; *Ratcliffe* v. *Winch*, 17 Beav. 217.

(*l*) *Stiles* v. *Guy*, 16 Sim. 230; 1 Mac. & G. 422, *post*, p. 1474. See also *Mucklow* v. *Fuller*, Jacob. 198; *Stiles* v. *Guy*, 4 Y. & Coll. 571; *Dix* v. *Burford*, 19 Beav. 409. But see also *Paddon* v. *Richardson*, 7 De Gex, M. & G. 563.

(*m*) *Ante*, p. 1290.

(*n*) 7 East, 258.

(*o*) See, however, Wentw. Off. Ex. 235, 14th edit.

found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in cases of loss without any negligence on their part (*p*), I say as no such case in respect to executors has yet occurred in a Court of Law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favour of this defendant."

in equity:

However, a more lenient doctrine was established in the Courts of Equity (*q*), as will fully appear in the course of this section.

loss by theft or casualty:

Thus, if any goods of the testator are stolen from the possession of an executor, or from the possession of a third person, to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire (*r*), the executor shall not, in equity, be charged with these as assets. The principle is that a bailee is not liable for the conse-

(*p*) But see Wentw. *ubi supra;* Com. Dig. Assets (D.); *ante*, p. 1291.

(*q*) See the judgment of Lord Eldon in *Massey* v. *Banner*, 1 Jac. & Walk. 248.

(*r*) *Croft* v. *Lyndsey*, 2 Freem. 1. It seems that executors are not bound either to insure or to continue the insurance of their testator: *Bailey* v. *Gould*, *coram* Alderson, B., 4 Y. & Coll. 221; *Fry* v. *Fry*, 27 Beav. 146. By sect. 18 of the Trustee Act, 1893, replacing sect. 7 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is enacted that, (1) "A trustee [which, by sect. 50, includes the duties incident to the office of personal representative of a deceased person] may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) "This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested so to do.

(3) "This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust."

quences of such an accident where all reasonable care has been taken (*s*). But it would be otherwise if the loss arose through the wilful default of the executor. For instance, if through his default title deeds are lost or destroyed, he will be liable to an action to establish the contents thereof, and to make compensation for any damage done to the estate by such loss or destruction in addition to the costs of procuring attested and office copies (*t*). But it would seem that the Court will refuse to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it from the absence of the deeds (*u*).

And now since by virtue of the Judicature Act, 1873, sect. 25, sub-sect. 11, where there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail, it follows that where the assets of a testator have come into the possession of an executor and are afterwards lost to the estate the rule of law as well as of equity now is that the executor stands in the position of a gratuitous bailee and therefore cannot be charged without some wilful default (*x*).

loss by invalid security:

Again, where an executor puts out the money of his testator, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss, any more than he would have been entitled to the profits, had it continued good (*y*).

(*s*) *Jones* v. *Lewes*, 2 Ves. Sen. 240; *Brown* v. *Sewell*, 11 Hare, at p. 52.

(*t*) *Hornby* v. *Matcham*, 16 Sim. 325. As to forms of declarations and orders relating to lost instruments, see Seton, 6th edit. Vol. III. p. 2295.

(*u*) *Brown* v. *Sewell*, 11 Hare, 49, and see also *Gillian and Nugent* v. *National Bank, Ltd.* (1901), 2 I. R. 513.

(*x*) See *Job* v. *Job*, 6 C. D. 562.

(*y*) *Brown* v. *Litton*, 1 P. Wms. 141: but see *Norbury* v. *Norbury*, 4 Madd. 191. On the general question as to the precautions which an executor ought to take, and the extent to which he may properly lend, with reference to the value of the property to be mortgaged, see *Stickney* v. *Sewell*, 1 M. & Cr. 8, 15; *Macleod* v. *Annesley*, 16 Beav. 600; *Phillipson* v. *Gatty*, 7 Hare, 516; *Farrar* v. *Barraclough*, 2 Sm. & G. 231, 235; *Ingle* v. *Partridge*, 34 Beav. 411; *Learoyd* v. *Whiteley*, 12 App. Cas. 727. The provisions of the Trustee Act, 1893, sects. 8 and 9 (replacing sects. 4 and 5 of the Trustee Act, 1888 (51 & 52 Vict. c. 59)), as to the duties, powers, and liability of executors and administrators in lending

After an administration decree has been made, all powers of management of the estate which may be vested in trustees are subject to the control of the Court, and the Judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees (*z*).

The rule is, never to permit a trustee or executor *after a decree* to account, to lay out money on mortgage, or to deal with the assets for the purposes of investment, without the leave of the Court: Where, therefore, the executor, after a decree, and consequently after he might have had the directions of the Court, chooses to lay out the money on mortgage, if the transaction should appear to be for the benefit of the party entitled, the Court will give him the advantage of it; but if otherwise, will consider the fund as money, and make the executor bring it into Court (*a*).

loss by loans on personal security:

With respect to loans upon personal security, the Court of King's Bench, in *Webster* v. *Spencer* (*b*), was of opinion that an executor who had lent out, on the security of a promissory note, money belonging to the testator, but not wanted for the immediate uses of the Will, was not guilty of a *devastavit*, provided he exercised a fair and reasonable discretion on the subject (*c*). Nevertheless, although the lending itself may not amount to a legal *devastavit*, yet the rule is now completely established, that an executor or administrator, lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust (*d*), and shall be personally answerable if the security prove defective.

money of the testator or intestate on real security, are set out on pp. 1454, 1455, *post*.

(*z*) *Bethell* v. *Abraham*, L. R. 17 Eq. 24.

(*a*) *Widdowson* v. *Duck*, 2 Meriv. 494, 498, 499.

(*b*) 3 B. & Ald. 360.

(*c*) In this case, one of two executors had lent the money in question on the promissory note, and the question was whether both the executors were properly joined as plaintiffs in an action to recover it. It was assumed that if the loan had been a *devastavit*, the executor who was the lender ought to have sued alone in his individual character. But see the observations of Bayley, J., in *Clarke* v. *Hougham*, 2 B. & C. 155, *ante*, pp. 664, 665.

(*d*) *Terry* v. *Terry*, Prec. Chanc. 273; *Ryder* v. *Bickerton*, 3 Swanst. 80, note; *S. C.*, 1 Eden, 149, note; *Adye* v. *Feuilleteau*, 1 Cox, 24; *S. C.*, 3 Swanst. 84, note; *Holmes* v. *Dring*, 1 Cox, 1; *Wilkes* v. *Steward*, Coop. 6; *Vigrass* v. *Binfield*, 3 Madd. 62; *Walker* v. *Symonds*, 3 Swanst. 63, overruling *Harden* v. *Parsons*, 1 Eden, 145; *Bacon* v. *Clark*, 3 My. & Cr. 294; *Clough* v. *Bond*, *ibid.* 490, 496;

If, however, the Will directs the executors to lay out the fund in real *or personal* securities, they would be justified, as against legatees, using a sound discretion, and fairly and honestly lending it to a person whom they considered responsible, at a reasonable interest (*e*): But the rule is different, it would seem, as against creditors (*f*): And though the Will gives the executors power to lend on personal security, this does not enable them, even as against legatees, to *accommodate* a trader with a loan on his bond (*g*).

loss from loans to each other:

It must further be observed, that where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them all, with respect to the solvency of the borrowers: If one of them lends to the other, this object is defeated: consequently, such a loan is a breach of trust, and a misappropriation of the fund; and if any mischief arises to the estate of the testator therefrom, the executors will be liable (*h*). Accordingly, in *Stickney* v. *Sewell* (*i*), two executors were empowered, by Will, to lend money on government, real, or personal security: One of them, in 1815, lent part of the fund to the other executor and his partner in trade upon mortgage: The mortgagors became bankrupt in 1831, and then the mortgaged property, which consisted in part of a windmill, a water-mill, and a house in a town, being sold, produced considerably less than the sum advanced: And it was held by Sir C. Pepys, M. R., that the executors were liable for the deficiency.

loss by fall of stocks;

An executor is not justified in unnecessarily keeping his testator's money dead in his hands (*k*): and, therefore, if the

Bullock v. *Wheatley*, 1 Coll. 130. But see *Re Grindey*, [1898] 2 Ch. 593, where sect. 3 of the Judicial Trustee Act, 1896, was applied to relieve the executors from their breach of trust and personal liability.

(*e*) *Forbes* v. *Ross*, 2 Cox, 116.

(*f*) See *Doyle* v. *Blake*, 2 Sch. & Lef. 239, 240.

(*g*) *Langston* v. *Ollivant*, Coop. 33. See further, as to *devastavit* by suffering money to remain in the hands of bankers, &c., which, according to the directions of the trust, should have been invested in a particular mode: *Bacon* v. *Clark*, 3 My. & Cr. 294; *Lowry* v. *Fulton*, 9 Sim. 115.

(*h*) —— v. *Walker*, 5 Russ. 7; *Gleadow* v. *Atkin*, 2 Cr. & J. 548, 555. But if the one should give a bond to the other, to save him harmless from the consequences of such a breach of trust, the bond would be valid at law: *Warwick* v. *Richardson*, 10 M. & W. 284.

(*i*) 1 My. & Cr. 8.

(*k*) See *post*, p. 1457.

exigencies of his office do not require otherwise, the executor should invest the unemployed money in investments authorized by statute for that purpose (*l*). The rule is that if an executor lays out the testator's money in such investments, he is not liable for the fall of stocks (*m*). But if he invests it in any other fund, which afterwards sinks in value, the loss will be thrown on him, although there be no *mala fides* on his part (*n*). On the other hand, if any profit happen by the rise of the stock in which the executor has laid out the money, he shall not have the benefit, but it shall accrue to the estate of his testator (*o*).

by not investing in the authorized funds:

If a testator die leaving investments other than those authorized by Act of Parliament, and has not specifically bequeathed them, it is the duty of the executor (in the absence

(*l*) *Holland* v. *Hughes*, 16 Ves. 114; *Tebbs* v. *Carpenter*, 1 Madd. 306; *Norbury* v. *Norbury*, 4 Madd. 191. Where a trustee has trust money in his hands, which he is authorised to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing an anticipated mortgage, in investing the money in Exchequer Bills: *Matthews* v. *Brise*, 6 Beav. 239.

(*m*) *Peat* v. *Crane*, 2 Dick. 499, note; *Franklin* v. *Frith*, 3 Bro. Chanc. Cas. 434; *Howe* v. *Lord Dartmouth*, 7 Ves. 150; White & Tudor's Leading Cases, 7th edit. Vol. II. p. 644. So if he invests money in the Three per Cents., and *duly* appropriates the same for the benefit of a legatee, the executor shall not be liable for the fall of stocks: *Ex parte Champion*, cited in *Hutcheson* v. *Hammond*, 3 Bro. Chanc. Cas. 147; Fonbl. Treat. Eq. B. 2, c. 7, s. 6, note (*p*). But it is otherwise where the appropriation is unduly made. Thus, where a legacy was left to A. on marrying with consent, and, till marriage, interest to be paid at three per cent.; and the executrix laid out a sum equal to the legacy, and conveyed to trustees in trust to pay the legacy with three per cent. interest, and to pay the surplus interest to her; it was holden that this was not a good appropriation, and, the stocks having fallen in value, that the executrix's estate should make it good: *Cooper* v. *Douglas*, 2 Bro. Chanc. Cas. 232. See *ante*, p. 1134.

(*n*) *Hancom* v. *Allen*, 2 Dick. 498; *Howe* v. *Lord Dartmouth*, 7 Ves. 150; *Clough* v. *Bond*, 3 My. & Cr. 497. See also *Gordon* v. *Bowden*, 6 Madd. 342. He was not answerable for any further loss than was occasioned by his buying the other stock instead of the Three per Cents.: *Hynes* v. *Redington*, 1 J. & L. 589. It may be doubted whether, where trustees had the power of investing moneys in Government securities, they were even before the passing of the Acts of Parliament hereinafter referred to, absolutely bound to select Three per Cents. for that purpose: see *Angell* v. *Dawson*, 3 Y. & Coll. 316, *per* Alderson, B.; *Robinson* v. *Robinson*, 1 De G. M. & G. 255, 256, by Lord Cranworth.

(*o*) *Phayre* v. *Peree*, 3 Dow. 128.

of express authority in the Will to retain the same) to convert them and invest the proceeds in authorized investments (*p*).

Formerly the only fund in which an executor might properly invest the unemployed money of the testator was the 3*l.* per cent. consols, *i.e.*, the fund adopted by the Court of Chancery, and an executor investing in such security was held by the Court not to be liable for any fall which might take place, although if he invested in any other fund which afterwards sank in value he was held liable for such depreciation even in the absence of any *mala fides* on his part. But now the class of investments authorized for trust funds has been considerably enlarged, and the trustee or executor investing in any of the authorized funds will not be responsible for any fall in value.

Authorized trust investments: Trustee Act, 1893.

Most of the provisions now in force for authorizing these investments are contained in the Trustee Act, 1893 (56 & 57 Vict. c. 53), which enacts:—Sect. 1. "A trustee (*q*) may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands (*r*), whether at the time in a state of investment or not, in manner following, that is to say:—

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom:

(b) On real or heritable securities in Great Britain or Ireland: (*s*).

(*p*) See *ante*, p. 1122 *et seq.*

(*q*) By sect. 50, the expressions "trust" and "trustee" include the duties incident to the office of personal representative of a deceased person.

(*r*) This power of investment does not extend to authorizing trustees to set apart or appropriate any of such stocks to answer a particular purpose, *e.g.* to provide for an annuity given by Will, so as to facilitate the distribution of the testator's estate: *Re Owthwaite*, [1891] 3 Ch. 494, decided under the Trust Investment Act, 1889.

The words "trust funds in his hands" were under the Trust Investment Act, 1889, held to include all trust funds in the hands of the trustee, whether at the time in a state of investment or not: *Hume* v. *Lopes*, [1892] A. C. 112, affirming the decision of the Court of Appeal in *Re Dick*, [1891] 1 Ch. 423. The effect of this decision has been incorporated into the Trustee Act, 1893.

(*s*) See sect. 9 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), which provides that: "A power to invest trust money in real securities shall authorize and be deemed to have always authorized an investment upon mortgage of property held for an unexpired term of not less than two hundred years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to

(c) In the stock of the Bank of England or the Bank of Ireland:

(d) In India Three and a half per cent. Stock, and India Three per cent. Stock or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India:

(e) In any securities the interest of which is for the time being guaranteed by Parliament:

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

(g) In the debenture or rentcharge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock: (*t*).

(h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company:

(i) In the debenture stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(j) In the "B." Annuities of the Eastern Bengal, the East Indian and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the pur-

any condition for re-entry except for non-payment of rent."

(*t*) See, however, sub-sect. (*o*) and R. S. C. Ord. XXII. r. 17. See also Lewin on Trusts, 11th edit. pp. 357, 358.

chased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having according to the return of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order: (*u*)

(n) In nominal or inscribed stock issued, or to be issued, by any commissioners incorporated by Act of Parliament (*x*) for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court: (*y*)

and also from time to time to vary any such investment" (*z*).

(*u*) See as to this sub-section, *Re Druitt*, [1903] 1 Ch. 446. Cf. also sect. 5 (3) of the Act, set out below, and the note in Wolst. Conv. Acts, 8th edit. p. 208.

(*x*) See *Re Smith*, [1896] 2 Ch. 590.

(*y*) See R. S. C. 1883, Ord. XXII. r. 17.

(*z*) These words are not confined

Purchase at a premium of redeemable stocks.

Sect. 2. (1.) "A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in sect. 1 of the Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) "Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sects. (g), (i), (k), (l), and (m), of sect. 1, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) "A trustee may retain until redemption, any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act."

Discretion of trustees.

Sect. 3. "Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds."

Sect. 4. "The preceding sections shall apply as well to trusts created before, as to trusts created after, the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust" (*a*).

Enlargement of express powers of investment.

Sect. 5. (1.) "A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent; and

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

(2.) "A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of

to investments made under the Act, but extend to any investment, whenever made, upon any such stocks, funds, or securities, as are mentioned in the section: *Re Dick*, [1891] 1 Ch. 423 (decided under the Act of 1889); affirmed in the House of Lords, *sub nom. Hume* v. *Lopes*, [1892] A. C. 112.

(*a*) There are many local Acts of Parliament (such, for instance, as the Metropolis Water Act, 1902) which contain express provisions authorising trustees to invest in the stocks and debentures thereby authorised to be created.

company may, unless the contrary is expressed in the instrument authorizing the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3.) "A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

(4.) "A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorizing the investment, invest in any securities of the government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(5.) "A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865."

Power to invest, notwithstanding drainage charges.

Sect. 6. "A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge" (*aa*).

Trustees not to convert inscribed stock into certificates to bearer.

Sect. 7.—(1.) "A trustee, unless authorized by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(a) The India Stock Certificate Act, 1863;
(b) The National Debt Act, 1870;
(c) The Local Loans Act, 1875;
(d) The Colonial Stock Act, 1877.

(*aa*) An investment on a second mortgage of land in England is a breach of trust: *Chapman* v. *Browne*, [1902] 1 Ch. 785, per Romer, L. J., at p. 800; *Re Newland*, W. N. (1904) 181. It has been decided in Ireland that a loan of trust funds on a second mortgage of land in Ireland is not of itself, and in the absence of other circumstances, a breach of trust: *Smithwick* v. *Smithwick*, 12 Ir. Ch. Rep. 181; *Crampton* v. *Walker*, 31 L. R. Ir. 437; but see *Chapman* v. *Browne*, *ubi supra*.

(2.) "Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorized to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted" (*b*).

Loans and investments by trustees not chargeable as breaches of trust.

Sect. 8.—(1.) "A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report (*c*).

(2.) "A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3.) "A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) "This section applies to transfers of existing securities as well as to new securities and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the

(*b*) For particulars of the various sections repealed by the Trustee Act, 1893, and replaced by sects. 5, 6 and 7 of the Act set out in the text, see Wolst. Conv. Acts, 8th edit. pp. 210—212.

(*c*) See as to the effect of and recent decisions on this sub-section, Wolst. Conv. Acts, 8th edit. pp. 212, 213.

twenty-fourth day of December one thousand eight hundred and eighty-eight."

Liability for loss by reason of improper investments.

Sect. 9.—(1.) "Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2.) "This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

By sect. 4 of the Trustee Act (1893) Amendment Act, 1894 (57 Vict. c. 10), it is provided that a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment authorized by the instrument of trust or by the general law (*d*).

Consequence of not converting property bequeathed for life with remainder over:

It has already appeared (*e*), that where personal property is bequeathed for life, with remainder over, and not specifically, it is the duty of the executor, with certain exceptions, to convert it; and the tenant for life is entitled only upon that principle. In the case of *Dimes* v. *Scott* (*f*), a testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A. during her life, and after her death, for B.: The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to A. the interest at 10*l.* per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the three per cents., at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: And it was held by Lord Gifford, that the tenant for life was not entitled to the

(*d*) See *Re Chapman*, [1896] 1 Ch. 323; [1896] 2 Ch. 763.

(*e*) *Ante*, p. 1117 *et seq.*

(*f*) 4 Russ. Chanc. Cas. 195. See also *Taylor* v. *Clark*, 1 Ha. 161; and cf. *Re Earl of Chesterfield's Trusts*, 24 C. D. 643, as to apportionment between tenant for life and remainderman of unconverted reversionary interests; and see *ante*, p. 1120.

actual interest which the money yielded, while it remained on the Indian security, but only to the dividends of so much three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had, in fact, paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the three per cent. stock at the end of a year from the testator's death: And this decision was confirmed, on appeal, by Lord Lyndhurst. In the case of *Mackenzie* v. *Taylor* (*g*), where the testator gave his residuary personal estate to his executors upon trust, as soon as convenient after his death, to convert into money and invest the same, and the executors allowed it to be enjoyed in specie by Mrs. M., the tenant for life, as long as she lived, but three years after her death, they accounted for the value and paid it into Court; it was held by Lord Langdale that they ought to pay interest at four per cent. from her death to the day of such payment (*h*). In *Wightwick* v. *Lord* (*i*), in a case where the Will gave no specific directions as to the payment of debts, the executor, who was also the ultimate residuary legatee, did not ascertain and secure the residue at the end of the year, but worked part of the property (a coal mine) to a profit for several years, when it ceased to be of any value; it was held, on a bill at the suit of a person having a charge for life on the residue, that the executor was not entitled to postpone the sale of the property to the prejudice of such person, and that having postponed it, he was chargeable with the value of the mine at the end of the year from the testator's death with interest thereon, and that that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years till it

(*g*) 7 Beav. 467.

(*h*) As to circumstances under which executors are charged with interest, see *post*, p. 1488; as to the rate of interest with which an executor may be charged, *post*, p. 1490. As to the rate of interest to be allowed in apportioning the amount of an unconverted reversionary interest on its falling into possession as between tenant for life and remainderman, see now *Re Goodenough*, [1895] 2 Ch. 537; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107; *ante*, p. 1120, note (*b*).

(*i*) 6 H. L. C. 217.

became unproductive, such annual profits to be treated as deferred payments.

But in *Baud* v. *Fardell* (*k*), it was held that an executrix, who was also tenant for life under a Will directing the residuary estate to be sold and the proceeds invested in government or other good securities, was not liable for not converting into consols a sum of Navy 5*l.* per cents. forming part of the residuary estate: for she had a discretion expressly reposed in her as to the nature of the investment.

Consequences of retaining in hand instead of investing; or of investing on a deficient security:

Where trustees are bound by the terms of their trust to invest the money in the public funds, and instead of doing so, they retain the money in their hands, or invest it upon an insufficient security, the *cestuis que trust* may elect to charge them either with the amount of the money, or with the amount of the stock which they might have purchased with the money (*l*). Where, however, the trustees are not bound to invest the money in the public funds, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, the authorities were conflicting on the question whether, if the trustees fail to invest as prescribed, the *cestuis que trust* can claim to charge them with the value of some particular security that might have been obtained, or whether they are merely chargeable with the whole amount of the trust fund, together with interest (*m*). But this question has been settled in favour of the latter view, by the decision of the Lords Justices in *Robinson* v. *Robinson* (*n*).

loss by not calling in money on securities, or in hands of banker.

This consideration leads to the question, how far an executor or administrator is liable in respect of losses occasioned by not calling in the money of the testator already invested upon securities. Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary: Accordingly, in *Powell* v. *Evans* (*o*), executors were charged with a loss caused by neglecting to call in money lent by

(*k*) 7 De G. M. & G. 628.

(*l*) *Shepherd* v. *Mouls*, 4 Hare, 503, 504; *Pride* v. *Fooks*, 2 Beav. 430; *Robinson* v. *Robinson*, 1 De Gex, M. & G. 256.

(*m*) *Hockley* v. *Bantock*, 1 Russ. 141; *Watts* v. *Girdlestone*, 6 Beav. 188; *Ames* v. *Parkinson*, 7 Beav. 379, were in favour of the former view: *Marsh* v. *Hunter*, 6 Madd. 295; and *Shepherd* v. *Mouls*, 4 Hare, 500, of the latter.

(*n*) 1 De Gex, M. & G. 247. See also *Knott* v. *Cottee*, 16 Beav. 80, 81, by Romilly, M. R.; *Brown* v. *Gellatly*, L. R. 2 Ch. 751, 759; *Re Campbell*, [1893] 3 Ch. 470; *Re Barclay*, [1899] 1 Ch. 674.

(*o*) 5 Ves. 839. See the effect of the Judicial Trustee Act, 1896; *Re Grindey*, [1898] 2 Ch. 593.

the testator on bond (*p*). Though the *primâ facie* rule is that executors should get in the assets of the testator within a year (*q*), there is no inflexible rule as to the time within which they are bound to do so, even with regard to risky securities. In every case the particular circumstances must govern, and the Court allows the executors a reasonable discretion (*r*). Where executors have neglected to realize assets which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it. Thus in *Hughes* v. *Empson* (*s*) losses were occasioned by the non-sale of Crystal Palace shares, which were at a premium at the testator's death, but which subsequently fell to a discount, and the executors were charged with the value at the end of twelve months. So in *Moyle* v. *Moyle* (*t*), executors and trustees who, for upwards of a year after the testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss (*u*). So executors were held personally liable in respect to the loss to the testator's estate of a sum outstanding on personal security, although the security was that of a bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his Will he directed that his trustees should get in his outstanding estate "as soon as conveniently might be" after his decease (*x*). But in *Buxton* v. *Buxton* (*y*), an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a

(*p*) See also *ante*, p. 1442; *Rowley* v. *Adams*, 4 Mylne & Cr. 496, and *Eagleton* v. *Kingston*, 8 Ves. 466, 467; *Att.-Gen.* v. *Higham*, 2 Y. & Coll. C. C. 634. The money, when called in, should be invested in the three per cents. or other authorized fund, if there is no present occasion for it: *Howe* v. *Lord Dartmouth*, 7 Ves. 149, 150. This seems a sufficient answer to the inquiry of Lord Camden in *Orr* v. *Newton*, 2 Cox, 276.

(*q*) *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605, 606, *per* Page-Wood, L. J.; *Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232; *Brown* v. *Gellatly*, L. R. 2 Ch. 751, 759.

(*r*) *Hughes* v. *Empson*, 22 Beav. 181, 183, *per* Romilly, M. R.; *Marsden* v. *Kent*, 5 C. D. 598; *Re Chapman*, [1896] 2 Ch. 763, 782; *Brown* v. *Gellatly*, *ubi supra*.

(*s*) 22 Beav. 181.

(*t*) 2 Russ. & M. 710.

(*u*) See *Johnson* v. *Newton*, 11 Hare, 168, 169.

(*x*) *Bullock* v. *Wheatley*, 1 Coll. 130.

(*y*) 1 Mylne & Cr. 80.

lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held, by Sir C. C. Pepys, M. R., under the circumstances, not to be liable for the loss consequent on his not having sold them sooner: And his Honour further held, that a difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand (*z*). This case was followed in the case of *Marsden* v. *Kent* (*a*), in which the Court held that where the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character, they ought not to be made personally responsible for the loss arising from their not having sold within the twelvemonth. And in *Re Chapman* (*b*) it was held by the Court of Appeal that there was no rule that executors and trustees retaining a security authorized by their trust are liable to make good a loss sustained through the fall in value of the security, provided that in so doing they have acted honestly and prudently, in the belief that they have taken the best course for all parties interested in the trust estate.

Where executors have an absolute discretion to postpone sale of testator's estate.

Executors acting under a Will by which *an absolute discretion is given to them to postpone the sale and conversion of the testator's estate* are not bound by the ordinary rule above referred to, viz., to convert the property within a year, even though some of the property consists of shares in an unlimited company, or of a business carried on by the testator, nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion (*c*). So too an express power to retain existing investments takes a case out of the rule as to the conversion of perishable property (*d*).

It is not the duty of an executor to call in money invested on real security, where no risk is apparent (*e*).

(*z*) See also *East* v. *East*, 5 Hare, 348.

(*a*) 5 C. D. 598.

(*b*) [1896] 2 Ch. 763. And see *Re Grindey*, [1898] 2 Ch. 593.

(*c*) *Re Norrington*, 13 C. D. 654. See also *Re Crowther*, [1895] 2 Ch. 56; *Re Pitcairn*, [1896] 2 Ch. 199; and cf. *Re Smith*, [1896] 1 Ch. 171.

(*d*) *Gray* v. *Siggers*, 15 C. D. 74.

(*e*) *Howe* v. *Lord Dartmouth*, 7 Ves. 150; *ante*, p. 1122 *et seq.* As

Receipt of trust money by person appointed by executor for the purpose.

Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands; and, consequently, the improper appointment of another to receive, who will not repay, is a *devastavit* (*f*). Thus, in a case where the Will directed that one Pistor should carry on the business of the testator to a given day, for the benefit of his estate, and the executors, from the confidence thus reposed by the testator in Pistor, permitted him to get in debts, without anything appearing on the Will to show the testator's intention to that effect, the Court of Exchequer held, that the executors must answer to the residuary legatee for the money so received by their agent (*g*). So where trustees for sale sold the trust property and placed the conveyance executed by them and having their receipt indorsed, in the hands of a solicitor, who received and misapplied the purchase-money, they were held liable for a breach of trust (*h*). Again, where trustees left some Exchequer Bills, in which they had properly invested trust money, in the hands of a broker, they were held personally liable upon a misapplication of the bills by the broker (*i*).

But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible

to whether Turnpike Bonds are real securities, see *Robinson* v. *Robinson*, 1 De Gex, M. & G. 247, and *Cavendish* v. *Cavendish*, 30 C. D. 227.

(*f*) *Jenkins* v. *Plombe*, 6 Mod. 93.

(*g*) *Pistor* v. *Dunbar*, 1 Anst. 107.

(*h*) *Ghost* v. *Waller*, 9 Beav. 497. See also *Bostock* v. *Floyer*, L. R. 1 Eq. 26; *Sutton* v. *Wilders*, L. R. 12 Eq. 373; *Re Brier*, 26 C. D. 238. The liability of the executor, according to the case of *Speight* v. *Gaunt*, 9 A. C. 1, affirming the decision of the Court of Appeal reported in 22 C. D. 727, would seem to depend on whether the defaulting agent was properly employed. If he was properly employed in the ordinary course of business, the executor would not seem to be liable: *Sutton* v. *Wilders* (*ubi supra*) would probably be decided differently since *Speight* v. *Gaunt*. See *post*, p. 1465, as to the power to appoint a solicitor as agent to receive money under sect. 17 of the Trustee Act, 1893.

(*i*) *Matthews* v. *Brise*, 6 Beav. 239. See also *Rowland* v. *Witherden*, 3 Mac. & G. 568, and Trustee Act, 1893, s. 24 (replacing 22 & 23 Vict. c. 35, s. 31), *post*, p. 1475.

for the loss (*k*). So if the executor, living in London, and receiving money of the testator, should remit to an attorney in the country to pay the debts there, and the attorney becomes insolvent, the executor will not be chargeable, if the business was transacted in the ordinary manner without any circumstance to show suspicion (*l*). So where executors employ an auctioneer to sell the leaseholds, or other portion of the assets, who receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss (*m*). But in *Darke* v. *Martyn* (*n*), where a testator died in March, 1823, and in January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers on their notes carrying interest; and the bankers failed in November, 1825; Lord Langdale, M. R., held, that *as no necessity had been shown for such deposit*, the trustees were personally responsible for the loss (*o*). So where a trustee deposited a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, he was held answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months afterwards, when the bankers became bankrupt (*p*). And if an executor pays the money of the testator into a banker's, not on any distinct account, but *mixing it with his own money*, it would seem that the executor will be answerable for the loss sustained by the failure of the banker (*q*). So,

(*k*) *Churchill* v. *Hobson*, 1 P. Wms. 243; *Knight* v. *Lord Plymouth*, 3 Atk. 480; *S. C.*, 1 Dick, 120; *Ex parte Belchier*, Ambl. 219; *Rowth* v. *Howell*, 3 Ves. 565; *Adams* v. *Claxton*, 6 Ves. 226; *Wilks* v. *Groom*, 3 Drewr. 584; *Swinfen* v. *Swinfen*, 29 Beav. 211; *Johnson* v. *Newton*, 11 Hare, 160; *Mendes* v. *Guedalla*, 2 J. & H. 259; *Fenwick* v. *Clarke*, 31 L. J. Ch. 728; *Re Bird*, L. R. 16 Eq. 203; *Speight* v. *Gaunt*, 9 App. Cas. 1; *Re Brier*, 26 C. D. 238.

(*l*) *Bacon* v. *Bacon*, 5 Ves. 334, 335; *Castle* v. *Warland*, 32 Beav. 660; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707.

(*m*) *Edmonds* v. *Peake*, 7 Beav. 239. See also Trustee Act, 1893, *post*, p. 1475.

(*n*) 1 Beav. 525.

(*o*) See also *Rehden* v. *Wesley*, 29 Beav. 213.

(*p*) *Challen* v. *Shippam*, 4 Hare, 555.

(*q*) *Wren* v. *Kirton*, 11 Ves. 377; *Fletcher* v. *Walker*, 3 Madd. 73; *Massey* v. *Banner*, 4 Madd. 413; *S. C.*, 1 Jac. & Walk. 241; *Robinson* v. *Ward*, Ry. & Mood. 274; *S. C.*, 2 C. & P. 59. See also *Salway* v. *Salway*, 2 Russ. & M. 215, in which case, Lord Brougham held (overruling the decision of Sir J. Leach, M. R., 4 Rus. 60), that a receiver appointed by the Court is answerable for the loss of moneys consequent on the

where an executor or trustee pays trust money to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheque, the rule in *Clayton's Case* (*r*), attributing the first drawings out to the first payments in, does not apply, and the executor or trustee must be taken to have drawn out his own money in preference to the trust money (*s*).

Review of law in *Speight* v. *Gaunt.*

The whole of the law on the question of the liability of executors and trustees for losses in the management and realization of trust estates was reviewed in the House of Lords in the case of *Speight* v. *Gaunt* (*t*). The general result seems to be this: Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as according to the usual mode of conducting business of a like nature persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and where, according to the usual and regular course of such business (*u*), moneys receivable or payable ought to pass through the hands of such mercantile agents (*x*), that course may properly be followed by trustees, though the moneys are trust moneys; and if under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss (*y*). In con-

failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund: This judgment was afterwards affirmed in Dom. Proc.: *White* v. *Baugh*, 9 Bligh, 181.

(*r*) 1 Mer. 572.

(*s*) *Re Hallett's Estate*, 13 C. D. 696, overruling *Brown* v. *Adams*, L. R. 4 Ch. 764; *Re Oatway*, [1903] 2 Ch. 356.

(*t*) 9 A. C. 1.

(*u*) Where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was: *Re Brier*, 26 C. D. 238.

(*x*) This rule is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. It is not part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest money on mortgage: *Fry* v. *Tapson*, 28 C. D. 268.

(*y*) *Ex parte Belchier*, Ambl. 218. A trustee although remunerated for his services is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the

formity with this doctrine the statute 22 & 23 Vict. c. 35, s. 31 (*z*), enacted that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability "for any banker, broker, or other person, with whom any trust moneys or securities may be deposited."

But neither this statute nor the doctrine of *Ex parte Belchier* (*a*) authorized a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which there is no moral necessity from the usage of mankind for the employment of such an agency. The cases of *Rowland* v. *Witherden* (*b*), *Bostock* v. *Floyer* (*c*), and many others show that trustees bound to invest trust moneys in authorized securities are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse (*d*).

General result of authorities as to the liability of executors for loss of assets.

The result of the authorities on the subject of the general liability of executors was thus stated by Lord Cottenham, in the year 1838, in his judgment in the case of *Clough* v. *Bond* (*e*): "Although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper

trust property, and is selected and employed without negligence: and *semble*, the liability of a trustee is not increased by the fact of his being remunerated for his services: *Jobson* v. *Palmer*, [1893] 1 Ch. 71.

(*z*) See *post*, p. 1475.

(*a*) Ambl. 218. Cf. *ante*, p. 712.

(*b*) 3 Mac. & G. 568, 574.

(*c*) 35 Beav. 603, 606; L. R. 1 Eq. 26.

(*d*) See *per* Lord Selborne, L. C., in *Speight* v. *Gaunt*, 9 A. C. 1, 5.

(*e*) 3 Mylne & Cr. 496.

motive (*f*). Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*g*); or if he leave money due upon personal security, which, though good at the time, afterwards fails (*h*). And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus he is not liable upon a proper investment in the three per cents. for loss occasioned by the fluctuations of that fund (*i*), but he is for the fluctuations of any unauthorized fund (*k*). So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted: Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative: But, if without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable although the person possessing it be a co-executor or co-administrator" (*l*).

(*f*) Of course if there be fraud or wilful default on the part of the executor, or he be actuated by an improper motive, he will be liable for any loss: *De Cordova* v. *De Cordova*, 4 A. C. 692.

(*g*) *Phillips* v. *Phillips*, 2 Freem. 11, *ante*, p. 1442; *Fry* v. *Fry*, 27 Beav. 144.

(*h*) *Powell* v. *Evans*, 5 Ves. 839; *Tebbs* v. *Carpenter*, 1 Madd. 290. Or if he fail to take legal proceedings to enforce payment of the trust funds if not paid within a reasonable time, unless he has a well-founded belief that such proceedings would be fruitless: *Re Brogden*, 38 C. D. 546; or if, even on the advice of a competent solicitor and surveyor, he invest on a freehold security of an improper character, such as brickworks, though within the terms of a power of investment on real property: *Re Whiteley*, 33 C. D. 247; 12 A. C. 727. See also *ante*, pp. 1442, 1457.

(*i*) *Peat* v. *Crane*, 3 Dick, 499, note; *ante*, p. 1447.

(*k*) *Hancom* v. *Allen*, 2 Dick, 498; *Howe* v. *Lord Dartmouth*, 7 Ves. 137; *ante*, p. 1448.

(*l*) *Langford* v. *Gascoyne*, 11 Ves. 333, *post*, pp. 1469, 1470; *Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477, *post*, p. 1470; *Underwood* v. *Stevens*, 1 Meriv. 712, *post*, p. 1476; *Styles* v. *Guy*, 1 Mac. & G. 422, *post*, p. 1474; *Trutch* v. *Lamprell*, 20 Beav. 116. The following are cases bearing on the general principles above stated, viz., *Bacon* v. *Clark*, 3 M. & Cr. 294; *Lowry* v. *Fulton*, 9 Sim. 115; *Munch* v. *Cockerell*, 9 Sim. 339; 5 M. & Cr. 178; *Broadhurst* v. *Balguy*, 1 Y. & Coll. Ch. C. 16; *Booth* v. *Booth*, 1 Beav. 125; *Phillipson* v. *Gatty*, 7 Hare, 516; *Byrne* v. *Norcott*, 13 Beav. 336; *Garner* v. *Moore*, 3 Drewr. 277; *Lander* v. *Weston*, 3 Drewr. 389; *Collinson* v. *Lister*, 20 Beav. 356; 7 De G. M. & G. 634; *Gibbins* v. *Taylor*, 22 Beav. 344; *Selby* v. *Bowie*, 4 Giff. 300; *Griffith* v. *Porter*, 25 Beav. 236; *Fry* v. *Fry*, 27 Beav. 144, 146.

Modern legislation has, however, gone some little way towards alleviating the burden of responsibility which was thrown on executors and trustees by the earlier decisions. Thus, by sect. 56 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is provided that:—

44 & 45 Vict. c. 41, s. 56. Receipt in deed or indorsed authority for payment to solicitor.

(1.) "Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

(2.) "This section applies only in cases where consideration is to be paid or given after the commencement of this Act."

And by sect. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing sect. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is provided that:—

56 & 57 Vict. c. 53, s. 17. Receipt of money by solicitor as agent.

(1.) "A trustee (*m*) may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee (*n*).

(2.) "A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money

(*m*) Which in this Act by sect. 50 includes an executor or administrator.

(*n*) See Wolst. Conv. Acts, 8th edit. p. 226; *Re Hetling and Merton*, [1893] 3 Ch. 269.

payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of, and to produce, the policy of assurance, with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3.) "Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary (*o*) to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4.) "This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.

(5.) "Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

59 & 60 Vict. c. 35. Protection of trustees in cases of breach of trust.

By sect. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), it is enacted as follows :—

(1.) "If it appears to the Court that a trustee (*p*), *whether appointed under this Act or not*, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

(2.) "This section shall come into operation at the passing of this Act."

(*o*) *Wyman* v. *Paterson*, [1900] A. C. 271.

(*p*) By sect. 1 (2) of the Act, the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act. See *Re Ratcliff*, [1898] 2 Ch. 352.

No general rules or principles can be laid down as those to be acted on in carrying out this section: each case depends on its own circumstances. But the trustee must be shown to have acted reasonably as well as honestly (*q*).

The onus is on a trustee who applies for relief under the section to prove that he has satisfied its requirements. One test in the case of a trustee lending trust moneys may be whether he would have acted in the same way if the money had been his own. *Primâ facie*, the provisions of the Trustee Act, 1893, s. 8, constitute a reasonable standard by which his conduct in such matters may be judged (*r*).

The section applies to the case of an executor who has committed a *devastavit*, but in construing the section, the Court is bound to remember the provisions of 22 & 23 Vict. c. 35, s. 29, and to see that there has been no undue delay in advertising for claims (*s*).

The section is not confined to cases of breach of trust, but applies to an action for a common account (*t*).

Semble, the statute does not by implication confer jurisdiction on the Court to exercise by anticipation the authority thereby conferred upon it, so as to excuse a breach of trust which is only contemplated (*u*).

In what case an executor is liable for the *devastavit* of his co-executor.

A *devastavit* by one of two executors or administrators will not charge his companion (*x*), provided he has not intentionally or otherwise contributed to it: For the testator's having misplaced his confidence in one shall not operate to the prejudice of the other (*y*).

Hence, an executor will not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor (*z*). Hence, also, the circumstances that one of two

(*q*) *Re Turner*, [1897] 1 Ch. 536; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707. Where trustees, erroneously assuming they had a power of sale, made an otherwise proper sale of settled leaseholds, they were relieved under this section: *Perrins* v. *Bellamy*, [1898] 2 Ch. 521; [1899] 1 Ch. 797.

(*r*) *Re Stuart*, [1897] 2 Ch. 583.

(*s*) *Re Kay*, [1897] 2 Ch. 518.

(*t*) *Re Kay*, *supra*; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707, 716.

(*u*) *Re Tollemache*, [1903] 1 Ch. 457, 466.

(*x*) Wentworth, Off. Ex. 306, 14th edit.; *Anon.*, Dyer, 210, *a*; *Hargthorpe* v. *Millforth*, Cro. Eliz. 318; *Williams* v. *Nixon*, 2 Beav. 472.

(*y*) Cro. Eliz. 319.

(*z*) Cro. Eliz. 319; *Littlehales* v. *Gascoyne*, 3 Bro. Chanc. Cas. 74;

executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, did not affect the latter, so as to make him guilty of a *devastavit* by paying an inferior debt (*a*); though, perhaps, if notice to one executor were proved, and nothing more appeared, it would have been presumed that he communicated it to his co-executor (*b*).

But where an executor, possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over, will be answerable for their misapplication, unless he can show a good reason for having so acted (*c*).

The rule may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had entrusted to receive it (*d*). Accordingly, although the appointment of one of several trustees to manage the property would not *per se* make the other trustees responsible for his acts, yet it would make the trustee so appointed the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts or receipts of a stranger (*e*).

Williams v. *Nixon*, 2 Beav. 472; *Dix* v. *Burford*, 19 Beav. 412, by Romilly, M. R. See *post*, p. 1596, as to a finding by a jury upon a plea of *plene administravit* by several executors, that one only had assets. See also Trustee Act, 1893, s. 24, *post*, p. 1475.

(*a*) *Hawkins* v. *Day*, Ambl. 162.

(*b*) *Ibid.* See *Timson* v. *Ramsbottom*, 2 Keen, 35; *Smith* v. *Smith*, 2 Cr. & M. 231; *Meux* v. *Bell*, 1 Hare, 73.

(*c*) *Townsend* v. *Barber*, Dick, 356; *Macpherson* v. *Macpherson*, 1 Macq. H. of L. 243. However, in the case of *Davis* v. *Spurling*, 1 Russ. & M. 66, an executor was employed by his co-executor as his agent to sell an estate which, under the Will of the testator, the co-executor alone had power to sell: The executor so employed handed over the price of the estate to the co-executor, who afterwards misapplied it: And Sir John Leach, M. R., held, that although, by the Will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate, yet the executor, so handing it over, was not accountable for the misapplication of it; inasmuch as he had no legal right to retain it: for it was in his hands, not as executor, but simply as agent of his co-executor, who alone had power to sell the estate and to receive the price of it.

(*d*) See Mr. Cox's note to *Churchill* v. *Hobson*, 1 P. Wms. 241, and Lord Thurlow's judgment in *Sadler* v. *Hobbs*, 2 Bro. C. C. 117.

(*e*) *Home* v. *Pringle*, 8 Cl. & F.

But if an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not necessarily responsible (*f*). If, however, the one, in any way, contributes to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse (*g*). Thus, in the case of several executors, if, by agreement among themselves, one is to receive and intermeddle with such part of the estate, and another with such a part, each of them will be chargeable for the whole; because the receipts of each are pursuant to the agreement made between them (*h*). So where A., B., C., D. and E. (the two latter being married women) took out administration to an intestate, and afterwards appointed C. to be the acting administrator, and directed the creditors to pay their debts to him: and C. became insolvent; it was held that A., B. and the husbands of D. and E., were responsible for C.'s receipts (*i*). So where a man made several executors, who all joined in the sale of the testator's goods, but one only received the money, and he became insolvent; it was held that they should all be charged (*k*).

264, 268. See also *Toplis* v. *Hurrell*, 19 Beav. 423, where the rule here stated was adopted by Romilly, M. R. See also *Candler* v. *Tillett*, 22 Beav. 263; *Cowell* v. *Gatcombe*, 27 Beav. 568; *Ingle* v. *Partridge*, 32 Beav. 661. It was held by the Court of Appeal in *Re Gasquoigne*, [1894] 1 Ch. 470, that the proposition in *Candler* v. *Tillett*, *supra*, that an executor who does an act by which his co-executor obtains sole possession of a part of the testator's estate is liable for the co-executor's misapplication of it, must be read "who unnecessarily does an act." Such an act is not "unnecessary" if it is done in the regular course of business in administering the property.

(*f*) *Langford* v. *Gascoyne*, 11 Ves. 335; *Candler* v. *Tillett*, 22 Beav. 257. This, it would seem, applies only to cases where the question arises under a decree for the common accounts, and not under a special charge against the executor for wilful neglect and default: *Terrell* v. *Mathew*, 1 M. & G. 433, note (*a*). See also the remarks of the reporters of that case, *ibid.* He would clearly be liable if he stood by and saw his co-executor commit a breach of duty. See the cases cited *post*, pp. 1473, 1474.

(*g*) *Langford* v. *Gascoyne*, 11 Ves. 335; *Hewett* v. *Foster*, 6 Beav. 259; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16. See also note (*d*), *supra*.

(*h*) *Gill* v. *Att.-Gen.*, Hardr. 314; cf. *Lewis* v. *Nobbs*, 8 C. D. 591; *Moses* v. *Levi*, 3 Y. & C. C. C. 359.

(*i*) *Lees* v. *Sanderson*, 4 Sim. 82.

(*k*) *Aplyn* v. *Brewer*, Prec. Chan. 173; *Burrows* v. *Walls*, 5 De G. M. & G. 233.

Accordingly, an executor, having a fund standing in the joint names of himself and another, cannot, upon the mere representation of the co-executor be justified in doing, without further inquiry, an act that is an exercise of power over that fund: the act must be necessary for the purposes of the Will, and he has the duty imposed upon him of exercising at least ordinary and reasonable diligence to inquire whether the representation of the co-executor is true (*l*).

If an executor has been dealing with the assets for a considerable time, much beyond that period in which, according to the ordinary course, the debts would be paid, and he applies to the other executor to have a fund put into his hands exclusively, and the other does inquire, and satisfies himself that there are debts unpaid, and the real purpose of the executor making the application was to apply the fund to the discharge of debts; and if it turns out afterwards, that he had in his own hands a fund sufficient for the payment of those debts, and therefore the application of the other fund to that purpose was unnecessary, and that fund was not in fact devoted to the purpose for which it was provided, it would be impossible for the executor, who parted with it, to discharge himself: He would be subject to the imputation of negligence, as having been too easy with his co-executor; too remiss in not asking how he had been dealing with the assets in his hands. It was accordingly held by Lord Eldon, in *Shipbrook* v. *Lord Hinchinbrook* (*m*), that where executors joined in a transfer of stock, vested in the name of all the executors, to a co-executor, upon his groundless representation that it was required for debts, the executors were answerable for the whole of the produce of the stock which they could not prove to have been applied by the co-executor to the payment of debts of the testator: But his Lordship further held, that they were not liable so far as they could prove the application to that purpose, although he possessed other funds, part of the assets, not through them, which funds he wasted.

Again, in *Langford* v. *Gascoyne* (*n*), it appeared from the

(*l*) *Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 254; 16 Ves. 477; *Hewett* v. *Foster*, 6 Beav. 259; *Broadhurst* v. *Balguy*, 1 Y. & Coll. Ch. C. 16.

(*m*) 11 Ves. 252; *S. C.*, 16 Ves. 477. See also *Mendes* v. *Guedalla*, 2 Johns. & H. 259; *Chambers* v. *Minchin*, 7 Ves. 186; *Underwood* v. *Stevens*, 1 Meriv. 713; *Williams* v. *Nixon*, 2 Beav. 472; *Hewett* v. *Foster*, 6 Beav. 259; *Broadhurst* v. *Balguy*, 1 Y. & Coll. Ch. C. 16.

(*n*) 11 Ves. 333.

affidavit of a witness, that on the day after the testator's funeral, his three executors, Gascoyne, Spurrell and Lambert, met at his house, and his widow, being present, left the room to fetch a bag of money: Upon her return with it, she asked the witness to which of the executors she should deliver it; and the witness not then having a good opinion of Gascoyne's circumstances, advised her to give it to Spurrell; upon which she passed by Gascoyne and Lambert, who were sitting near the door, and gave the bag into the hands of Spurrell, who counted the money over, and then delivered it into the hands of Gascoyne: The witness further stated, that at the time Gascoyne was not reputed to be in good circumstances: And Sir Wm. Grant held, that the money must be considered to have been so far in the hands of Spurrell, that he was answerable for what afterwards became of it; but that as to the other executor, Lambert, it was impossible to charge him: for that he had neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne: And his Honour observed, that it was not incumbent upon one executor by force to prevent the money getting into the hands of another.

So in *Moses* v. *Levi* (*o*), a testatrix bequeathed the residue of her property to certain persons, some of whom lived in the west of England, and others in Norfolk, and she appointed two persons to be executors, one of whom lived at Clifton, and the other at Diss: The executors having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which the Clifton executor was to pay the residuary legatees in the west of England, and the Diss executor those in Norfolk; and the residuary funds were apportioned between them for that purpose: The Diss executor made default in payment of one of the legatees in that neighbourhood: And Alderson, B., held that the other executor was responsible for the default.

But if one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such a situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss; for if he had been a sole executor, and had, under the same circumstances, placed the money in a banker's hands, he would not have been liable (*p*). So if an executor in the country executes a power

(*o*) 3 Younge & Coll. 359. See also *Lewis* v. *Nobbs*, 8 C. D. 591.

(*p*) *Churchill* v. *Hobson*, 1 P. Wms. 241; *Chambers* v. *Minchin*,

of attorney to a co-executor in town for the purpose of changing a fund of the testator, as the Court would order it to be changed, as from the long annuities to three per cents., the act is justifiable, being for a purpose belonging to the administration of assets; but not to change it to an unauthorized investment (*q*). So in *Bacon* v. *Bacon* (*r*), where an executor living in London, paid money to his co-executor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, Lord Loughborough held, that the executor, who had paid the money under such circumstances, should not be charged with the loss (*s*).

One executor not answerable for receipt of the other merely by taking probate, &c.

Again, it has been held, that one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer (*t*): Accordingly, where a bill of exchange was remitted to two agents, payable to them personally, who, on the death of the principal, became his executors, Lord Alvanley held, that the mere indorsement of

7 Ves. 198. See also *Att.-Gen.* v. *Randell*, MS. Rep. 21 Vin. Abr. 534, tit. Trust.; (N. a.) pl. 9. As to delegation, see *ante*, p. 1460. See also *ante*, pp. 712, 1426.

(*q*) *Chambers* v. *Minchin*, 7 Ves. 193, by Lord Eldon. See *ante*, p. 1462.

(*r*) 5 Ves. 331.

(*s*) This decision was approved of by Lord Eldon, in *Chambers* v. *Minchin*, 7 Ves. 193. See *Davis* v. *Spurling*, 1 Russ. & M. 66, where Sir John Leach, M. R., intimates, that an executor, handing over assets to his co-executor for the express payment of a particular debt, will not be answerable for their misapplication. See also *Castle* v. *Warland*, 32 Beav. 660; but in *Hanbury* v. *Kirkland*, 3 Sim. 265, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with consent of the wife: The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5 per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock: The co-trustees, without inquiring into the matter, complied: The trustee sold the stock and absconded: And Sir L. Shadwell, V.-C., held that the co-trustees were liable. See also accord. *Broadhurst* v. *Balguy*, 1 Y. & Coll. Ch. C. 16; *Trutch* v. *Lamprell*, 20 Beav. 116.

(*t*) *Hovey* v. *Blakeman*, 4 Ves. 596. But see *ante*, p. 1469, note (*f*), and *Styles* v. *Guy*, 1 Mac. & G. 422, considered, *post*, p. 1474.

one, after they were executors, in order to enable the other to receive the money, was not sufficient to charge him who did not receive it (*u*). So it was laid down by Lord Redesdale in *Joy* v. *Campbell* (*x*), that if an executor, living in London, remits money to his co-executor to pay debts in Suffolk, "he is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way: It would be the same, were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible; for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence" (*y*).

But the rule, it should seem, was different at law prior to the Judicature Act: Thus, in *Crosse* v. *Smith* (*z*), it was held, that an executor administering, having once received money, assets of his testator, could not discharge himself, under a plea of *plene administravit* to an action by a bond creditor, by showing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. Now, however, the rule at law as well as in equity, is that the executor stands in the position of a gratuitous bailee, and, therefore, cannot be charged without some wilful default (*a*).

Liability of executor who stands by and

It may here be mentioned that by the established rules of Courts of Equity, it is the duty of all executors to watch over,

(*u*) *Hovey* v. *Blakeman*, 4 Ves. 608, 609.

(*x*) 1 Sch. & Lef. 341.

(*y*) In *Speight* v. *Gaunt*, 22 C. D. 727, 744, Jessel, M. R., commenting on this case says: "That is a mere question of selecting an agent. Of course, although the testator reposed confidence in him something else might happen afterwards, the man might become insolvent, or the like, it does not mean that, but it is an additional reason that a man who was in good credit at the time was actually named as executor by the testator."

(*z*) 7 East, 246.

(*a*) *Job* v. *Job*, 6 C. D. 562, explained in *Meyer* v. *Murray*, 8 C. D. 424; Judic. Act, 1873, sect. 25, sub-s. 11. See *ante*, pp. 1291, 1444.

sees a breach of trust committed by his co-trustee:

and, if necessary, to correct the conduct of each other; and that an executor as well as a trustee, who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust (*b*). Accordingly in *Booth* v. *Booth* (*c*), where a testator bequeathed to his partner and to one Batkin his personal estate, upon trust to invest the same, for the benefit of his wife and children, and both the executors proved the Will, but the surviving partner retained the testator's monies in the trade, and lost them, Lord Langdale, M. R., held, that Batkin, who took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it, was responsible for the consequences of the breach of trust. So, in *Lincoln* v. *Wright* (*d*), two executors, who permitted their co-executor to retain in his hands the ascertained residue, were held by the same learned Judge to be liable for a breach of trust. Again, in *Styles* v. *Guy* (*e*), where two out of three executors, with the knowledge that there were unsettled accounts subsisting at the testator's death between him and their co-executor, on taking which they had reason to believe that the latter would be found to be considerably indebted to the estate, took no effectual measures to compel him to account and pay or secure the balance for several years, at the end of which he became bankrupt, Lord Cottenham held, that the solvent executors (who were unable to prove that an attempt to recover the money at an earlier period would have been fruitless) were responsible for the loss, as having been occasioned by their wilful neglect and default (*f*).

not precluded by the usual indemnity clause.

In cases of the description above considered, a trustee or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility on account of the acts of his co-trustees or co-executors (*g*).

(*b*) *Styles* v. *Guy*, 1 Mac. & G. 433, by Lord Cottenham; *Williams* v. *Nixon*, 2 Beav. 475, by Lord Langdale; *Horton* v. *Brocklehurst*, 29 Beav. 510, by Romilly, M. R.

(*c*) 1 Beav. 125.

(*d*) 4 Beav. 427.

(*e*) 1 Mac. & G. 422.

(*f*) See also *Egbert* v. *Butter*, 21 Beav. 560; *Candler* v. *Tillett*, 22 Beav. 257; *Re Gasquoigne*, [1894] 1 Ch. 470.

(*g*) *Mucklow* v. *Fuller*, Jacob. 198. See also *Underwood* v. *Stevens*, 1 Meriv. 712; *Hanbury* v. *Kirkland*, 3 Sim. 265; *Williams* v. *Nixon*, 2 Beav. 472; *Dix* v. *Burford*, 19 Beav. 409; *Brumridge* v. *Brumridge*, 27 Beav. 5; and *per* Lord Selborne in *Re Brier*, 26 C. D. at p. 243. But where the Will provided that any trustee who shall

Trustee Act, 1893, s. 24. Restriction on liability of trustees.

The Trustee Act, 1893, s. 24 (replacing 22 & 23 Vict. c. 35, s. 31), provides that "A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers" (*h*).

Liability of an executor who renounces after an act of administration.

It may here be observed, that if an executor administers part of the assets, he shall be charged with such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved the Will (*i*): For executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the assets themselves, or by putting the administration into the hands of a Court of Equity (*k*). Thus in *Doyle* v. *Blake* (*l*), A., named executor in a Will, acted on behalf of particular legatees, disclaiming an intention of interfering generally: He afterwards renounced formally in favour of B., who was named a trustee in the same Will, who thereupon obtained administration *cum testamento annexo:* B. possessed himself of the assets, and afterwards died insolvent: And it was held that A. was liable, as executor, notwithstanding his renunciation; and was answerable for the acts

pay to his co-trustee, or enable him to receive, monies for the general purposes of the Will, should not be obliged to see to due application thereof or be responsible by reason of express or implied notice of the misapplication, it was held that this was a good answer to a bill against two of three trustees to make good trust monies which they had allowed their co-trustee to receive: *Wilkins* v. *Hogg*, 3 Giff. 116. See accord. *Pass* v. *Dundas*, 43 L. T. 665; 29 W. R. 332.

(*h*) See, as to this section, *Re Smith*, [1896] 1 Ch. 71; *Re Bennett*, *ibid.* 778; and as to indemnity of trustees generally, Lewin on Trusts, 10th edit. p. 283 *et seq.*; *Speight* v. *Gaunt*, 9 Ap. Cas. 1.

(*i*) *Read* v. *Truelove*, Ambl. 417.

(*k*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231, 245. See *Riky* v. *Kemmis*, 1 Lloyd & Goold, 101; *Horton* v. *Brocklehurst*, 29 Beav. 504.

(*l*) 2 Sch. & Lef. 231.

of B., it appearing that he had a control over the assets, and B. being considered as having obtained possession thereof by his means. So in *Underwood* v. *Stevens* (*m*), one of two executors and trustees did not act, otherwise than by joining with his co-executor and trustee in the sale of stock under a representation that the sale was necessary for payment of debts, which it was not; the produce was received by the latter, and the greater part applied by him to his own private purposes: And the first executor was held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at four per cent.; notwithstanding the parties beneficially interested consented to and approved of the sale, under a similar misrepresentation. Again, in *Rogers* v. *Frank* (*n*), the defendant, named in the Will as executor, did not prove the Will, but before he renounced, he collected large sums belonging to the estate of the testator: And it was held that he was liable to be sued in equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will (*o*).

But an executor, who has not proved, is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, or by writing directly to a debtor of the testator, and requiring payment (*p*). So, if one of two persons named executors disclaims and renounces, who afterwards possesses himself of assets as agent to the other, who has proved the Will, the former does not thereby become accountable as executor (*q*). So in *Stacey* v. *Elph* (*r*), a person named as executor and trustee under a Will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust: During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: and it was held that he was not, under the circum-

(*m*) 1 Meriv. 712.

(*n*) 1 Y. & J. 409.

(*o*) See also *Harrison* v. *Graham*, stated *infra*, p. 1477.

(*p*) *Orr* v. *Newton*, 2 Cox, 274.

(*q*) *Dove* v. *Everard*, 1 Russ. & M. 231. See also *Lowry* v. *Fulton*, 9 Sim. 104.

(*r*) 1 M. & K. 195.

stances, chargeable as executor or trustee. But in *Harrison* v. *Graham* (*s*), the case was as follows: Barbara Graham by Will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the Will, and acted chiefly as executrix, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. Stock, received the money, and paid it over the same day to Margaret: After this she and the mother died, making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: The question was, whether this was such an act of administration in Robert, as should make him chargeable as to his own estate: The Master had charged him, and the case came on, upon exceptions to the report: Lord Hardwicke:—"The question in the case is, whether or no this defendant had acted as an executor, and consequently whether he is chargeable? I agree that there may be cases where an executor may act, as an attorney to the other executors. If an executor renounces and then acts under a letter of attorney, it is no administration: for it depends on the nature of the act, accompanied with any other acts. Here is a Will and four executors. The Will is proved by one only, with a reservation of the rights of the other three. Here appear to have been acts done by them all, and a letter of attorney given by the defendant, together with the other executors, to Margaret, who indeed is described therein as the only acting executrix. But the defendant describes himself there as an executor. This was clearly acting as an executor. Then he afterwards accepts another letter of attorney from Margaret, and the rest of the executors. Shall executors be allowed to discharge themselves at their pleasure from being liable to assets? Money comes into his hands, he pays it over to Margaret; this cannot discharge him" (*t*).

Liability of an executor who has

It is a general rule, that where an executor has once proved the Will, he cannot renounce his representative character, and

(*s*) 3 Hill's MS. 239; 1 P. Wms. 241, note (*y*) to 6th edit.

(*t*) See also *James* v. *Frearson*, 1 Y. & C. C. C. 370; and the cases collected, *ante*, p. 202.

proved, but declines to act as executor.

act under another: he can do no act in regard to the estate for which he is not answerable as executor. In the case of *Graham* v. *Keble* (*u*), a partner in a house of agency in India, where a deposit was made in trust for a particular purpose, was made one of the executors of him who made the deposit, and proved the Will: A power of attorney was sent from the executors in Europe to the house of agency, for them to act under: But it was held, that as the partner named executor had proved the Will, the house could only act under his authority, and that he himself could not renounce the executorship, and act in another character. But a co-executor, who proved, but never acted, cannot be charged by reason of the mere circumstance that he received a letter by post from a debtor to the estate, inclosing a bill of exchange on account of his debt, which bill the co-executor immediately sent to the acting executor, who afterwards became insolvent (*x*).

Liability of a co-executor joining in a receipt.

Formerly there was much discussion as to whether an executor who joined in signing a receipt for money of which he had never had control, but which had been received by his co-executor, thereby made himself liable for its application (*y*).

Stat. 22 & 23 Vict. c. 35, s. 31.

The non-liability of the executor appears to be now fully settled by sect. 24 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing the stat. 22 & 23 Vict. c. 35, s. 31 (*z*).

When a *devastavit* is released by concurrence or acquiescence.

Although it is true, as a general rule, that concurrence in an act of *devastavit* on the part of the parties injured by it, or acquiescence without original concurrence, will release the executors (*a*), yet the Court must inquire into all the circumstances which induced concurrence or acquiescence, and ascertain whether their conduct really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors from responsibility (*b*).

(*u*) 2 Dow. P. C. 17.

(*x*) *Balchen* v. *Scott*, 2 Ves. 678.

(*y*) See 8th Edit. of this Work, pp. 1840—1843.

(*z*) *Ante*, p. 1475.

(*a*) *Griffiths* v. *Porter*, 25 Beav. 236.

(*b*) *Walker* v. *Symonds*, 3 Swanst. 1; *Burrows* v. *Walls*, 5 De G. M. & G. 233, 251; *Davies* v. *Hodgson*, 25 Beav. 177. Neglect to sue, even for eighteen years, by a specialty creditor, is not such acquiescence in the non-payment by an executor of a sum payable under a covenant as to preclude the creditor from suing or charging the executor with a *devastavit* in neglecting to convert shares in a bank, which afterwards failed, and raise the necessary sum to pay the amount: *Re Baker*, 20 C. D. 230. The Court of Appeal in this case refused to draw any inference of

It may be noted that by sect. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing sect. 6 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is provided that:

56 & 57 Vict. c. 53, s. 45. Indemnity for breach of trust.

(1.) "Where a trustee (*c*) commits a breach of trust at the instigation or request or with the consent in writing (*d*) of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just (*e*) for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

(2.) "This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the 24th day of December, 1888, and is pending at the commencement of this Act."

Distinction as to executors' liability

It may be observed, in concluding this subject, that in *Churchill* v. *Hobson* (*f*), Lord Harcourt took a distinction

concurrence or acquiescence from neglect to sue within the time limited by the Statute of Limitations; cf. *Re Birch*, 27 C. D. 622. On the other hand, in *Sleeman* v. *Wilson*, L. R. 13 Eq. 36, where persons claiming as beneficiaries under a trust acquiesced for thirty-eight years in no steps being taken towards realizing securities, a portion of the trust estate, and after the death of the trustee filed a bill against the executors of the trustee, it was held that the plaintiffs, by their acquiescence, had lost their right to make any claim against the estate of the trustee; cf. *Dixon* v. *Dixon*, 9 C. D. 587; *Re Hulkes*, 33 C. D. 552. See further on the subject of *laches*, *ante*, p. 1082, note (*e*). A claim founded on a *devastavit* in distributing personal estate without providing for a mortgage debt was held to be barred after six years: *Re Gale*, 22 C. D. 820. See, however, *Re Marsden*, 26 C. D. 783. And see now as to the right of an executor to claim the benefit of the Statutes of Limitations, sect. 8 of the Trustee Act, 1888.

(*c*) Which includes, by sect. 50, an executor or administrator.

(*d*) The words "in writing" apply only to "consent," and not to "instigation" or "request": *Griffith* v. *Hughes*, [1892] 3 Ch. 105.

(*e*) The discretion which this section confers upon the Court of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee, ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust: *Griffith* v. *Hughes*, *ubi supra*.

(*f*) 1 P. Wms. 242.

between creditors and legatees.

between creditors and legatees (*g*). But Lord Thurlow, in *Sadler* v. *Hobbs* (*h*), said that this seemed to him an odd distinction, that a creditor should have a right to charge an executor and a legatee not. It would seem, however, that there may be cases where the strictness of law would charge a man as executor as to creditors, in which a Court of Equity would not charge him as to legatees: For example, legatees are bound by the terms of the Will, but creditors are not so: and therefore, in many instances executors would be discharged as against legatees, though not as against creditors (*i*).

Present law as to liability of *feme covert* executrix.

45 & 46 Vict. c. 75.

It remains to consider the doctrine of *devastavit*, as applied to the case of a married woman, executrix or administratrix.

It is provided by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), that:—

Sect. 1. (2.) "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

And by sect. 24: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action."

And by sect. 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or

(*g*) See the remark of Lord Northington on this distinction: *Haden* v. *Parsons*, 1 Eden, 148.

(*h*) 2 Bro. Chanc. Cas. 117.

(*i*) *Doyle* v. *Blake*, 2 Sch. & Lef. 239, 240.

persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer, or join in transferring, any such annuity or deposit as aforesaid (*k*), or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid (*k*), or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

And by sect. 23: "For the purposes of this Act the legal personal representatives of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Liability of husband and *feme covert* executrix for *devastavits* before Married Women's Property Act, 1882: before marriage:

Before the passing of the Married Women's Property Act, 1882, if a *feme sole*, being an executrix or administratrix, wasted the goods of her testator or intestate and then married, her husband was liable, as long as the coverture lasted, for the *devastavit* (*l*). But, upon her death his liability ceased: And such being the principle of law, Courts of Equity have held that they could not establish any rule upon the difference whether the husband had or had not received a portion with his wife (*m*).

It must, however, be observed, that if the wife was entitled to any *choses in action*, which the husband did not reduce into possession in her lifetime, so that it became necessary for him to take out administration to her, he was liable, as her administrator, for her *devastavit*, by virtue of the statute 30 Car. II. c. 12 (*n*).

during coverture:

With respect to the *devastavit* of the wife committed during the coverture, the husband was liable in law and in equity, as long as both parties were alive, for the acts of his wife as executrix or administratrix: for, as she had no power to act alone,

(*k*) See sect. 6 of the Act.

(*l*) *Kings* v. *Hilton*, Cro. Car. 603; *Heyward's Case*, Moore, 761; *Lumley* v. *Hutton*, 1 Roll. Rep. 268, 269; *Bachelor* v. *Bean*, 2 Vern. 60; Com. Dig. Baron and Feme (N.); *Palmer* v. *Wakefield*, 3 Beav. 227; cf. liability of husband or his executor for debts of wife, *ante*, p. 1403, and in respect of wife's fraud or tort, *ante*, p. 1406.

(*m*) *Adair* v. *Shaw*, 1 Sch. & Lef. 263.

(*n*) See *ante*, p. 1354.

his assent was presumed (*o*): And it was held, that the husband, though living separate from his wife, should be charged with her *devastavit* (*p*). If the assets were wasted, during the coverture, either by the husband or wife, a creditor or legatee of the testator might, it would seem, sue the wife as well as the husband, and if she predeceased him, her estate was answerable (*q*).

Upon the death of the wife, the general rule at law was, that the liability of the husband (except as her administrator) for his wife's *devastavit*, committed as well during coverture as before, ceased (*r*).

husband's liability after coverture for assets come to his hands:

But in equity, the surviving husband was liable for whatever assets came to the hands of his wife, or his own hands, during the coverture; upon the principle that all persons coming into possession of property bound by a trust are chargeable in equity as trustees: The cases establishing this head of equity are collected and commented upon by Lord Redesdale in his elaborate judgment in *Adair* v. *Shaw* (*s*), in which case his Lordship held, that where a *feme covert* obtained administration, and the goods were wasted during coverture, and the husband died, his assets were chargeable in equity for the waste committed during coverture. So in *Smith* v. *Smith* (*t*), Romilly, M. R., said it was settled law that a husband was liable for all the assets received or *devastavits* committed, either by himself or by his wife during the coverture, in respect of an estate of which his wife was legal personal representative, and that in this respect the husband was liable at law during his life and his estate after his death (*u*).

liability of his estate where the wife survives.

Executors' accounts:

On the subject of the accounts of an executor or administrator, there has already been occasion to state, that he must account for all profits which have accrued in his own time,

(*o*) *Adair* v. *Shaw*, 1 Sch. & Lef. 266.

(*p*) *Paget* v. *Read*, 1 Vern. 143.

(*q*) *Kingham* v. *Lee*, 15 Sim. 401, by Shadwell, V.-C.

(*r*) *Adair* v. *Shaw*, 1 Sch. & Lef. 261; 1 Saund. 219, *d*, note to *Wheatley* v. *Lane*. Likewise, if the goods of the testator remain *in specie* in the hands of the husband, the party entitled to them may, after the death of the wife, bring an action of trover or detinue against the husband to recover them: 1 Sch. & Lef. 262.

(*s*) 1 Sch. & Lef. 243. See also *Clough* v. *Bond*, 3 My. & Cr. 499; 8 Sim. 594.

(*t*) 21 Beav. 385, 387.

(*u*) See also *Charlton* v. *Coombes*, 4 Giff. 382.

they shall account for all profits:

either spontaneously, or by his acts, out of the estate of the deceased (*x*). Therefore, if an executor has a lease for years which yields profits to the value of 20*l.* a year, rendering rent of 10*l.* a year, he shall account for 10*l.* a year, as assets (*y*). So if the executor carries on the trade or business of the testator, whether in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator contained in his Will, or under the direction of the Court of Chancery, the profits must be accounted for as assets (*z*). Where the executors employ the assets in carrying on the trade for their own benefit, the legatees are entitled, at their option, to interest at 5 per cent. on the amount of assets employed, or the profits actually made (*a*). An executrix who held the residue of the testator's estate in trust for herself for life and after her death for the children of the testator, entered into a fresh partnership with two other persons and brought in the testator's assets as part of the capital of the firm, the other partners having notice of the trusts of the testator's Will, and it was held that the executrix and the other partners were bound to make good to the children the assets of the testator employed in trade, together with all profits, or else with interest at 5 per cent., at the option of the children (*b*). And it is still the rule of the Court that a trustee who employs trust moneys in trade or speculative transactions must account for the profit he makes by such employment, or, at the option of the *cestuis que trust*, be charged with interest at the rate above mentioned (*c*). It will be observed that in *Flockton* v. *Bunning* (*d*) the transaction was not a mere loan in breach of trust as in *Stroud* v. *Gwyer* (*e*) and *Vyse* v. *Foster* (*f*), but an embarking of trust funds in a partnership business, and that all the partners were cognizant of the breach of trust and were

(*x*) *Ante*, p. 1279. So he must account for all profits derived from his *office* as executor, as where he abandons it in favour of another for a valuable consideration: *Sugden* v. *Crossland*, 3 Sm. & G. 192.

(*y*) Godolph. Pt. 2, c. 24, s. 1; Com. Dig. Assets (C.).

(*z*) *Ante*, p. 1279 *et seq.*, and p. 1430; *Palmer* v. *Mitchell*, 2 M. & K. 672; *Willett* v. *Blanford*, 1 Hare, 253.

(*a*) *Wedderburn* v. *Wedderburn*, 22 Beav. 100; *post*, p. 1491.

(*b*) *Flockton* v. *Bunning*, L. R. 8 Ch. 323, note.

(*c*) *Re Davis*, [1902] 2 Ch. 314.

(*d*) L. R. 8 Ch. 323, in note to *Vyse* v. *Foster*.

(*e*) 28 Beav. 130.

(*f*) L. R. 8 Ch. 309; L. R. 7 H. L. 318.

defendants in the suit. It will also be observed that in the case of *Vyse* v. *Foster*, the partnership business in which the estate of the dead partner was embarked was duly wound up and the share of the dead partner ascertained, and the case therefore did not fall within the class of cases of which *Crawshay* v. *Collins* (*g*), *Brown* v. *De Tastet* (*h*), *Yates* v. *Finn* (*i*), are leading authorities. And the executor may be made to account for and pay over the profits, although the persons in partnership with whom he had made those profits are not made parties to the suit. So in the case of surviving partners who are the executors of the deceased partner, and who continue the trade after his death, employing his assets, they must account for the profits made by such employment (*k*), and it makes no difference that they have taken a security for it in the form of a mortgage of the real and personal property belonging to the partnership (*l*). It will be observed that, in the cases referred to, the relation of the executors and surviving partners was that of partners. In the case of *Vyse* v. *Foster* (*m*), the terms of the articles of partnership were such that on the death of any partner his share was to be taken by the surviving partners at a price to be ascertained from the last stocktaking, and to be paid by instalments extending over two years with interest at 5 per cent. from his death. The testator appointed three executors, one of whom was one of his partners in the business, and another some years after his death became a partner, and the third never was concerned in the business. The relation, therefore, between the executors and surviving partners was that of creditor and debtor (*n*), and the executors allowed the price payable by the surviving partners to remain outstanding on the personal security of persons engaged in trade: one of the executors at first and afterwards two of them being engaged in such trade as partners and having the use of the moneys so left in their hands. This the Court held to be, at least technically, a breach of trust, and James, L. J., in dealing with the liability incurred by the executors by this breach of trust says: "If an executor commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each

(*g*) 15 Ves. 218.

(*h*) Jac. 284.

(*i*) 13 C. D. 839.

(*k*) *Wedderburn* v. *Wedderburn*, *ubi supra*; *Townend* v. *Townend*, 1 Giff. 201.

(*l*) *Ibid.*

(*m*) L. R. 8 Ch. 309.

(*n*) See sect. 43 of the Partnership Act, 1890, set out *post*, p. 1487.

of them bound to make good the trust funds and interest. If an executor or a trustee makes profit by improper dealing with the assets or trust fund, that profit he must give up to the trust: if that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear or cannot be made to appear what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent." (*o*). The learned Lord Justice then pointed out that in the case in question it did not appear, and could not be made to appear, what profits were attributable to the employment of the trust money in the business, and the Court held that the plaintiff, who was one of the *cestuis que trustent*, was not entitled to any account of profits, the mere delay by executors in calling in any debt due to the testator's estate from the firm of which some of the executors were members not giving his estate any right to share in the profits of the business.

This decision of the Court of Appeal was affirmed by the House of Lords (*p*), and Lord Cairns, L. C., in delivering his opinion said: "If a partner in a trading firm dies, and if he constitutes one or more of his co-partners his executors, and if there is nothing special in the contract of co-partnership, and if the assets of the testator are not withdrawn from the co-partnership but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and familiar rule in the Court of Chancery to hold that the estate of that testator is to all intents and purposes entitled to the benefit of a share of the profits which are made in the trade after his death (*q*). And if this should happen, which is the principle of another class of cases, that the partnership articles have given the surviving partners an option to take to the interest of the testator on certain terms, at a certain price, to be fixed by arrangement after the death of the testator, an option or power which may be accepted or refused, but which if accepted and acted upon, must be acted upon according to the terms on which it is given; if in a case of that kind the surviving partners, or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option

(*o*) L. R. 8 Ch. 329.

(*p*) L. R. 7 H. L. 318.

(*q*) See now sect. 42 (1) of the Partnership Act, 1890, *post*, p. 1486.

which has been given, then again the power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place" (*r*). Lord Cairns, after pointing out that on the facts of the particular case before the House the plaintiff was not entitled to an account of the profits, proceeded thus: "I am bound to say that it appears to me that whenever a case shall occur in which relief upon the footing of an account of profits ought to be given, if it should appear that the executors of a deceased partner, acting along with surviving partners, have deliberately and without justification employed the assets of the testator in the trade of the partnership, I should expect to find that the Court of Chancery would be prepared to hold that all partners, not merely those who are executors of the testator, but also the surviving partners who are not executors, would be liable to account for profits made by the employment of that which to the knowledge of all of them is trust money which ought not to have been so applied. But I have not heard of any case, and I have not been able to find any case—for I put aside the case of *Brown* v. *De Tastet* (*s*) by reason of the great peculiarity of the facts of that case—where one surviving partner, being an executor, has been made answerable for the whole of the profits made in the trade by the employment of the capital of the testator, those profits being received not merely by the executor but by other partners not brought before the Court nor subjected to any liability under the decree."

S. 42 of the Partnership Act, 1890, 53 & 54 Vict. c. 39.

And now sect. 42 of the Partnership Act, 1890, provides as follows:—

(1.) "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership

(*r*) See now sect. 42 (2) of the Partnership Act, 1890.
(*s*) Jac. 284.

assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets.

(2.) "Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

S. 43 of the same Act.

And sect. 43 of the same Act provides that, "subject to any agreement between the partners the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

In *Simpson* v. *Chapman* (*t*), where the surviving partners admitted the executor into the firm in his individual character, and the business was carried on without employing, in any way, any part of the assets of the testator, it was held that he was not liable to account for profits as assets (*t*). On the other hand, in *Cook* v. *Collingridge* (*u*), a sale of a testator's share in a partnership trade, and the property belonging to it, made by his executors to his partners, for the purpose of being resold to one of his executors, was set aside, and his estate held entitled to his *aliquot* proportion of the subsequent profits as if the partnership had continued (*x*). And it is a general rule, that an executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account

(*t*) 4 De G. M. & G. 154.

(*u*) Jacob, 607. See 27 Beav. 456, note.

(*x*) "One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the Court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand": By Lord Eldon, Jacob, 621. See accord. *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 My. & Cr. 11; *Willett* v. *Blanford*, 1 Hare, 253. See also *Portlock* v. *Gardner*, 1 Hare, 594, 603.

for the utmost extent of advantage made by him of the subject so purchased (*y*). So if an executor compounds debts or mortgages, and buys them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and for want of them, the benefit shall go to the party who is entitled to the surplus (*z*). So in a case where the executor of a mortgagee for a term of years purchased the equity of redemption in fee for a small sum in his own name, and for his own benefit, it was held that he was a trustee of the fee for the benefit of the testator's estate (*a*).

Again, if an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby (*b*), he must account to the estate for all the benefit (*c*). Indeed, the principle is general, that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation: that if there be any loss he must replace it; but he cannot possibly be a gainer by it: any gain must be for the benefit of his *cestui que trust* (*d*).

in what cases executors are charged with interest:

This may be the proper place to inquire, under what circumstances executors or administrators shall be charged with interest

(*y*) *Hall* v. *Hallett*, 1 Cox, 134; *Watson* v. *Toone*, Madd. & Geld. 153; *ante*, p. 706; *Smedley* v. *Varley*, 23 Beav. 358. See *De Cordova* v. *De Cordova*, 4 App. Cas. 692. In *Clark* v. *Clark*, 9 App. Cas. 733, it was held by the Privy Council that a sale is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as, for instance, by proving the Will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld.

(*z*) *Anon.*, 1 Salk. 155; *Ex parte James*, 8 Ves. 346. Where an executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies, it was admitted that the transaction could not be sustained for the benefit of the executor; and it was also held that the deed of assignment did not operate as a release of the estate, and could not be upheld, as against the legatees who executed it, for the benefit of their co-legatees: *Barton* v. *Hassard*, 3 Dr. & W. 461.

(*a*) *Fosbrooke* v. *Balguy*, 1 M. & K. 226; Sug. V. & P. 14th edit. p. 708.

(*b*) See *ante*, p. 1446.

(*c*) *Adye* v. *Feuilleteau*, 1 Cox, 24.

(*d*) *Piety* v. *Stace*, 4 Ves. 622; *Crosskill* v. *Bower*, 32 Beav. 86.

on the assets retained in their hands. There are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate: 2nd. That he himself has made use of the money, or has committed some other *misfeasance*, to his own profit and advantage (*e*).

1st. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs (*f*), especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that according to the ordinary course of the Court, the fund is not considered distributable until after that time (*g*). But if the Court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence, and a breach of trust, and the Court will charge the executor with interest (*h*). And it seems, that outstanding demands, even on probable grounds, are no reason why the executors should not lay the testator's money out (*i*). But an executor shall not be charged with interest for

(*e*) *Rocke* v. *Hart*, 11 Ves. 59, 60; *Tebbs* v. *Carpenter*, 1 Madd. 306, 307; *Kildare* v. *Hopson*, 4 Bro. P. C. 550, Toml. edit.; *Lincoln* v. *Allen*, 4 Bro. P. C. 553, Toml. edit.; *Ashburnham* v. *Thompson*, 13 Ves. 401, *ante*, p. 1457.

(*f*) See *Dawson* v. *Massey*, 1 Ball & B. 231.

(*g*) *Forbes* v. *Ross*, 2 Cox, 115, 116, by Lord Thurlow.

(*h*) *Littlehales* v. *Gascoyne*, 3 Bro. Ch. C. 73; *Brown* v. *Southouse*, 3 Bro. Ch. C. 108; *Franklin* v. *Frith*, 3 Bro. Ch. C. 433; *Hall* v. *Hallett*, 1 Cox, 134; *Seers* v. *Hind*, 1 Ves. 294; *Longmore* v. *Broom*, 7 Ves. 124; *Ashburnham* v. *Thompson*, 13 Ves. 401; *Turner* v. *Turner*, 1 Jac. & W. 39; *Goodchild* v. *Fenton*, 3 Y. & Jerv. 481; *Stafford* v. *Fiddon*, 23 Beav. 386; *Johnson* v. *Prendergast*, 28 Beav. 480. In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount: *Jones* v. *Morrall*, 2 Sim. N. S. 241, 252. See also *Davenport* v. *Stafford*, 14 Beav. 319. The executors may be charged with interest on balances, though not claimed by the bill: 1 Jac. & W. 39. See *Jones* v. *Morrall*, 2 Sim. N. S. 241.

(*i*) *Franklin* v. *Frith*, 3 Bro. Ch. C. 434; 1 Madd. 305. It was resolved by Sir Joseph Jekyll, in *Taylor* v. *Gerst*, Mosely, 99, that if money placed out at interest be called in by the executor without any cause, he shall pay interest for it: But in *Newton* v. *Bennet*, 1 Bro. Ch. C. 361, Lord Thurlow said that an executor had an honest discretion to call in a debt bearing interest, if he thought the same in

a balance in his hands, retained under a fair apprehension of his right to it (*k*).

rate of interest.

As to the rate of interest which the executor shall pay, the rule until recently was that in those cases, where negligence alone was imputable to him, he should be charged with 4*l.* per cent. in respect of the balances, which he ought to have laid out, either in compliance with the express directions of the Will, or from his general duty, where the Will is silent on the subject (*l*). The practice has, however, been now adopted by all the Judges of first instance in the Chancery Division, in similar cases of charging the executor with interest at 3 per cent. instead of 4 (*m*). In order to induce the Court to charge the executor with more than the ordinary rate, a special case, such as a direct breach of trust, is necessary (*n*).

hazard. It should seem that he ought to lay it out again immediately in authorised security.

(*k*) *Bruere* v. *Pemberton*, 12 Ves. 386. So as to money paid away under a mistake as to the legal right to it: *Saltmarsh* v. *Barrett*, 31 Beav. 349. But in the case of *Re Hulkes*, 33 C. D. 552, this decision, viz., that executors who, acting *bonâ fide*, have distributed the assets upon what turns out to be an erroneous construction of the Will are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, was dissented from by Chitty, J., as departing from the principle established in *Att.-Gen.* v. *Köhler*, 9 H. L. C. 654, and *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843. An administrator *pendente lite* was not liable to pay interest upon a balance in his hands during the pendency of the suit in the Ecclesiastical Court: *Gallivan* v. *Evans*, 1 Ball & B. 191. Nor, if an administrator complies with an order for payment into Court of the balance representing payments disallowed in his accounts in the action, is he, in the absence of special circumstances, chargeable with interest thereon: *Re Jones*, [1897] 2 Ch. 190. The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid by him: *Blogg* v. *Johnson*, L. R. 2 Ch. 225.

(*l*) *Dornforth* v. *Dornforth*, 12 Ves. 130, note (29), 2nd edit.; *S. C.* cited 1 Madd. 302; *Ashburnham* v. *Thompson*, 13 Ves. 401; *Rocke* v. *Hart*, 11 Ves. 58, 60, 61; *Tebbs* v. *Carpenter*, 1 Madd. 307; *Sutton* v. *Sharp*, 1 Russ. Ch. C. 151; *Melland* v. *Gray*, 2 Coll. 295; *Re Hulkes*, 33 C. D. 552.

(*m*) See *per* Stirling, J., in *Re Barclay*, [1899] 1 Ch. 674, 686, in which case 3 per cent. was the rate charged. See also *Wyman* v. *Paterson*, [1900] A. C. 271, 279, 289.

(*n*) *Tebbs* v. *Carpenter*, 1 Madd. 290, 306; *Mousley* v. *Carr*, 4 Beav. 49; *Hosking* v. *Nicholls*, 1 Y. & Coll. Ch. C. 478, 480. See *De Cordova* v. *De Cordova*, 4 App. Cas. 692; *Re Barclay*, [1899] 1 Ch. 674.

Where executor employs assets for his own advantage.

2nd. With respect to the employment of the assets by an executor to his own advantage, Lord Hardwicke, on two occasions (*o*), expressed an opinion that an executor might do so without impropriety, and without being liable to any charge for interest. But this doctrine has been entirely overruled by more modern cases (*p*). And it is now established, that if the executor makes use of the money, he ought to pay the interest he made (*q*); upon the principle just above considered, that he ought not to derive any profit from the trust property (*r*). Hence it has become a settled rule that if a trustee, having trust money in his hands, knowingly applies it to his own use, or in his trade, he shall be charged with interest at the rate of 5 per cent. (*s*). If the fund is employed in trade, the *cestuis que trustent* have a right to an option of taking either the interest or the profits which have arisen from the trade (*t*): but they must elect to take either the profits for the whole period, or the interest for the whole period (*u*). Where an executor embarks his testator's

(*o*) *Adams* v. *Gale*, 2 Atk. 106; *Child* v. *Gibson*, 2 Atk. 603.

(*p*) *Perkins* v. *Baynton*, 1 Bro. C. C. 375; *Newton* v. *Bennet*, 1 Bro. C. C. 361; *Forbes* v. *Ross*, 2 Bro. C. C. 439; *Tebbs* v. *Carpenter*, 1 Madd. 304.

(*q*) *Forbes* v. *Ross*, 2 Cox, 116; *Rocke* v. *Hart*, 11 Ves. 60.

(*r*) *Ante*, p. 1482.

(*s*) *Mousley* v. *Carr*, 4 Beav. 49; *Re Davis*, [1902] 2 Ch. 314, where Farwell, J., held that 5 per cent. was still the rate chargeable in such cases.

(*t*) *Burden* v. *Burden*, cited 1 Jac. & Walk. 134; *Wedderburn* v. *Wedderburn*, 22 Beav. 100; *ante*, p. 1483.

(*u*) *Heathcote* v. *Hulme*, 1 J. & W. 122. In *Vyse* v. *Foster*, L. R. 8 Ch. 309, 334, which was a case in which a daughter of the testator, a beneficiary under the Will, was asking for an account of profits, having been credited with interest at 5 per cent. on her share of trust moneys, which consisted of the ascertained share of the testator left in breach of trust in the business in which he had been a partner, James, L. J., says: "It has been distinctly laid down that a plaintiff cannot claim both interest and profits in respect of the money employed in trade, but must elect between them, and it might be a grave question whether the plaintiff must not either adopt or repudiate the terms on which the successive partnerships were willing to hold her money. If she repudiate the arrangement, it might be considered that she would have to elect between interest and that share only of the profits made in respect of her capital which actually came into the hands of her trustees, as appears to have been held in *Jones* v. *Foxall*, 15 Beav. 388. The application, however, of that rule as to election between interest and profits to the case of an actual loan by a trustee in breach of trust to himself and others, would, we think, require

funds in trade without authority, it would seem that in no case will interest be charged against him at less than 5 per cent. (*x*). It has been further established, that if an executor or other trustee mixes trust funds with his private moneys, and employs them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed (*y*). And it would seem to be now settled, that an executor, who, being a trader, and having, of course, an account with a banker, places the assets at his banker's in his own name, by that means increases the balances in his favour, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged with interest at 5 per cent. (*z*).

There are many other cases where executors, who have applied the assets in direct dereliction of their duty, have been charged with 5 per cent. interest. Thus in *Forbes* v. *Ross* (*a*), there was an express trust, by a direction in the Will, to lay out the fund in the purchase of lands, or upon heritable or personal securities, at such a rate of interest as the executors should think reasonable; so that they were at liberty, using their discretion soundly and fairly and honestly, to lend it to anybody that they might suppose would give a reasonable interest for it, considering at the same time the degree of

very full consideration before the Court came to a final decision on it."

(*x*) *Heathcote* v. *Hulme*, 1 J. & W. 134, 135. See also *Robinson* v. *Robinson*, 1 De G. M. & G. 257, by Lord Cranworth; and *Re Davis*, [1902] 2 Ch. 314. There is a dictum which seems to imply the contrary in *Rocke* v. *Hart* (1805), 11 Ves. at p. 61.

(*y*) *Docker* v. *Somes*, 2 M. & K. 655; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 4 My. & Cr. 41; *Willett* v. *Blanford*, 1 Hare, 253; *Portlock* v. *Gardner*, 1 Hare, 594, 603.

(*z*) *Treves* v. *Townshend*, 1 Bro. Ch. C. 385; *Rocke* v. *Hart*, 11 Ves. 61; *Sutton* v. *Sharp*, 1 Russ. Ch. C. 151, 152; *Re Jones*, 49 L. T. 91. Although the Will authorized the executor to invest the residue on "good private securities:" *Westover* v. *Chapman*, 1 Coll. 177. See also *Re Hilliard*, 1 Ves. 90; *Melland* v. *Gray*, 2 Coll. 295; *Williams* v. *Powell*, 15 Beav. 461. But see *contra*, *Perkins* v. *Baynton*, 1 Bro. Ch. C. 375; *Brown* v. *Southouse*, 3 Bro. Ch. C. 107. See *Burdick* v. *Garrick*, L. R. 5 Ch. 233, as to what is employment of money in business.

(*a*) 2 Cox, 113; *S. C.*, 2 Bro. Ch. C. 430.

responsibility of the person to whom it was lent: they lent the fund to one of themselves, on bond at 4 per cent., when 5 per cent. might have been made by heritable or government securities: And it was held, that he should be charged with 5 per cent. interest. So in *Piety* v. *Stace* (*b*), the Will directed the executor to place the money in the public funds or upon mortgages or other good securities, and to pay the dividends and interest to certain persons for life, and after their death to dispose of the capital in a certain mode: The executor called in part of the property which was out on security, used it generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the Will, and he lent part to his son: And Lord Alvanley directed an account of all the executor had made, with interest at the rate of 5 per cent. upon the balances in his hands. In *Pocock* v. *Reddington* (*c*), the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, Lord Alvanley held that the *cestui que trust* had an option to have the stock replaced or the money produced by the sales, with interest at 5 per cent. or more, if more had been made by it, and the costs occasioned by the executor's misconduct (*d*). In *Mosley* v. *Ward* (*e*), an executor who unnecessarily called in property held by him in trust for infants which was out upon good security at 5 per cent., and who kept large balances in his hands which he used as his own, was ordered by Lord Eldon to be charged with interest at 5 per cent. and costs. In *Bick* v. *Motley* (*f*), the master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate: and that the sums so received by them were debts provable under their respective commissions; both executors having become bankrupt: Sir C. Pepys, M. R., said, that as, in respect of such sums, the executors had each committed a *devastavit*, each was chargeable, according to the uniform practice of the Court, with interest at 5 per cent. upon the sums which he had enabled his co-executor to receive: And his Honour accordingly made an order, that interest at that rate should be

(*b*) 4 Ves. 620.
(*c*) 5 Ves. 794.
(*d*) See also *Bate* v. *Scales*, 12 Ves. 402.
(*e*) 11 Ves. 581.
(*f*) 2 M. & K. 312.

added to the principal sums to be proved against the bankrupts' estates respectively (*g*). In *Jones* v. *Foxall* (*h*) and *Williams* v. *Powell* (*i*), Romilly, M. R., stated the rule as established by the authorities, that if an executor has retained balances in his hands, which he ought to have invested, the Court will charge him with simple interest at 4 per cent. (*k*) on the balances; but if in addition to such retention he has committed a direct breach of trust, or been guilty of misconduct, he will be charged after the rate of 5 per cent. (*l*).

But in the later case of *The Attorney-General* v. *Alford* (*m*), Lord Cranworth, C., said he could not understand the principle on which the Court can proceed *in pœnam* to punish the executor for his misconduct by making him account for more interest than he has received: and his Lordship stated his opinion to be, that the Court ought, in the case of an executor who has money in his hands which he ought to invest and does not invest, to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it: and the learned judge added, that misconduct did not seem to him to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result: And his Lordship proceeded to hold (varying a decree of Stuart, V.-C.) (*n*), that an executor who for several years had retained funds in his hands uninvested, which he ought to have invested, was chargeable only with simple interest at 4 per cent., there being no circumstance to

(*g*) See also *Munch* v. *Cockerell*, 9 Sim. 339, 351; confirmed as to charging the trustees with interest at 5 per cent., by Lord Cottenham, 5 M. & Cr. 178, 220.

(*h*) 15 Beav. 388.

(*i*) 15 Beav. 461.

(*k*) Now reduced to 3 per cent.: *vide ante*, p. 1490.

(*l*) See also the rule stated by the same judge in *Knott* v. *Cottee*, 16 Beav. 80.

(*m*) 4 De G. M. & G. 483, 851, 852. Cf. *Burdick* v. *Garrick*, L. R. 5 Ch. 233, 241. The principle, established in the above case of *Att.-Gen.* v. *Alford*, and also in that of *Att.-Gen.* v. *Köhler*, 9 H. L. C. 654, was approved of in *Re Hulkes*, 33 C. D. 552; *ante*, p. 1490, note (*k*).

(*n*) 2 Sm. & G. 488.

lead to the conclusion that he had made any profit by his misconduct: If indeed it had appeared that he had improperly used the money for his own purposes, the Court would not inquire what had been the actual proceeds of his speculation, but would infer he either did make 5 per cent., or ought to be estopped from saying that he did not (*o*).

Instances of compound interest.

As a general rule, the Court decrees the computation of simple interest to be made (*p*). But there are instances in which an executor has been charged with compound interest. Thus in *Raphael* v. *Boehm* (*q*), a legacy was given to the executor, with a declaration in the Will, that such a legacy should be in full for the trouble he might have in performing the duties of the Will, and that he should not have any claim for commission, or derive any advantage from keeping in his possession any sums of money, without duly accounting for the legal interest thereof: The testator then disposed of the residue upon certain trusts for his children, and directed that a sufficient part of the interest of the portions should be applied to the maintenance, &c., of each child, and the surplus should be accumulated: the executor did not lay the money out as directed, but kept upwards of 30,000*l.* in his hands, and used it in his trade, so that there was a wilful violation of the Will, which prohibited retainer and directed accumulation: And Lord Loughborough decreed, that an account should be taken from the moment of the testator's death, and interest be charged upon all the sums received, and rests to be made half-yearly upon the balance, including intermediate interest: so that double compound interest was given: The cause came on afterwards before Lord Eldon, upon exceptions to the Master's report, and though his Lordship did not approve of the decree, yet he agreed in the propriety of giving compound interest. So in *Knott* v. *Cottee* (*r*), where there was an express trust for accumu-

(*o*) See accord. *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 497, 519, in which case Lord Cranworth said that it was a mistake to suppose that he had laid it down in *Att.-Gen.* v *Alford* that a defaulting trustee could never be charged with more than 4 per cent. And see *Vyse* v. *Foster*, L. R. 8 Ch. 309, 333.

(*p*) *Robinson* v. *Cumming*, 2 Atk. 410.

(*q*) 11 Ves. 92; 13 Ves. 407, 590.

(*r*) 16 Beav. 77. This case was followed by Stirling, J., in *Re Barclay*, [1899] 1 Ch. 674, except that the rate of interest charged in that case was 3 per cent. only. Cf. also *Re Emmet's Estate*, 17 C. D. 142.

lation, Romilly, M. R., held that, though the circumstances were not such as to make it right to charge the executor with more than 4 per cent. interest on moneys which he had improperly invested, yet it was a case for annual rests. And other instances, where, in executors' accounts, interest has been given with rests, will be found in the cases cited in the note below (*s*). And it was held by Romilly, M. R., on two occasions (*t*), that if an executor employs the assets in trade or speculation, for his own benefit, he shall be charged either with the profits actually so obtained by him for the use of the money, or with compound interest at 5 per cent.

His Honour, however, observed, that the principle on which executors have been charged with compound interest has not been clearly defined, nor are the decided cases by any means free from obscurity or contradiction. The principle of some of them seems to have been, that the Court ought to visit the executor as it were with a penalty, when he has not merely misconducted himself, but has derived, or tried to derive, a profit for himself from the use of the money. And it has not unfrequently been said, that in order to make out a claim for compound interest, a very strong case of violation of duty is required (*u*). But there has already been occasion to mention that Lord Cranworth repudiated the doctrine of *punishing* the executor, and maintained the principle, with respect to compound as well as simple interest, that the Court ought to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or to presume he did receive (*x*).

It may here be observed, that a considerable difference of opinion has existed as to the effect of a direction to the Master "to make annual rests" in taking the account: In *Heighington* v. *Grant* (*y*), Lord Langdale, M. R., after reviewing all the

(*s*) *Stackpoole* v. *Stackpoole*, 4 Dow, 209; *Willson* v. *Carmichael*, 2 Dow & Clark, 58; *Walker* v. *Woodward*, 1 Russ. Chanc. Cas. 107; *Townend* v. *Townend*, 1 Giff. 201; *Walrond* v. *Walrond*, 29 Beav. 586. See also, on this subject, *Binnington* v. *Harwood*, 1 Turn. & R. 481; and Lord Brougham's judgment in *Docker* v. *Somes*, 2 M. & K. 655.

(*t*) *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, *ibid.* 461.

(*u*) See *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586; *Tebbs* v. *Carpenter*, 1 Madd. 290.

(*x*) *Att.-Gen.* v. *Alford*, *ante*, p. 1494.

(*y*) 5 M. & Cr. 258.

authorities, denied that a direction to ascertain balances, to compute interest on such balances, and "in taking the said accounts" to make annual rests, followed by a direction that the party shall be charged with interest, "after the rate and in the manner aforesaid upon such balances," could, without more, be considered as a direction to charge the defendant with compound interest, as so much principal received into the account of the following year: And his Lordship expressed his opinion that where compound interest is intended to be charged, a specific direction for that purpose should be given. But on appeal to Lord Cottenham, C., his Lordship, in an elaborate judgment, arrived at a different construction of the direction in question, and held that, under it, the interest computed on the balance due at the end of the first year was to form part of the balance due at the end of the second year, and upon which interest was then to be computed, and so on from year to year to the end of the account (*z*).

On setting aside sale to trustee no interest to be charged on rents and profits received by him.

On the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale (*a*).

Allowances to executor: for his expenses: for his trouble:

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office (*b*), except those which arise from his own default (*c*). But it is a general principle, that an executor or administrator shall have no allowance, at law or in equity, for personal trouble and loss of time in the execution of his duties (*d*). Nor is the case altered by the executor's renunciation of the executor-

(*z*) *Heighington* v. *Grant*, 5 M. & Cr. 258.

(*a*) Lewin on Trusts, 10th edit. p. 558; *Silkstone Co.* v. *Edey*, [1900] 1 Ch. 167.

(*b*) *Potts* v. *Leighton*, 15 Ves. 277; *Hyde* v. *Haywood*, 2 Atk. 126; Trustee Act, 1893, s. 24, *ante*, p. 1475. In these should be included the expenses of keeping up the testator's domestic establishment for a reasonable time after his death: *Field* v. *Peckett*, 29 Beav. 576.

(*c*) *Pannel* v. *Fenn*, Cro. Eliz. 348. He shall not be allowed the costs of an action against him as executor, which he ought never to have defended: *Chambers* v. *Smith*, 2 Coll. 742; *Smith* v. *Chambers*, 2 Phil. Ch. C. 221.

(*d*) *Robinson* v. *Pitt*, 3 P. Wms. 251; *Scatterygood* v. *Harrison*, Mosely, 130; *Brocksopp* v. *Barnes*, 5 Madd. 90.

ship, and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs (*e*). And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship, and on his dying before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands: the Court refused the claim, observing, that independently of the executor's having died before the trust was executed, such bargains ought to be discouraged, as tending to dissipate the property (*f*). So a surviving partner, being executor, is not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death (*g*). Again, in *New* v. *Jones* (*h*), it was held by Lord Lyndhurst, C. B., that if a solicitor or attorney, who is an executor, does professional business himself for the benefit of the estate, he is not entitled to be paid his bill of costs for such services: it would be placing his interest at variance with the duties he has to discharge (*i*). Accordingly in *Moore* v. *Frowd* (*k*), Lord Cottenham held, that a trustee, who is a solicitor, is entitled to be repaid such costs, charges and expenses only as he has properly paid out of his pocket; and that it makes no difference in this respect, that the instrument

(*e*) *Robinson* v. *Pett*, 3 P. Wms. 249.

(*f*) *Gould* v. *Fleetwood*, 3 P. Wms. 251, note (A). So in *Ayliffe* v. *Murray*, 2 Atk. 58, two persons, executors and trustees under a Will, would not prove the Will, nor suffer the *cestui que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay 100*l.* to one executor, and 200*l.* to the other, within six months after they should have exhibited an inventory: Lord Hardwicke declared the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* to the plaintiffs.

(*g*) *Burden* v. *Burden*, 1 Ves. & B. 170; *Stocken* v. *Dawson*, 6 Beav. 371. Nor is an executor and legatee of such surviving partner: *Ibid.* Cf. sect. 39 of the Partnership Act, 1890.

(*h*) Exchequer, August 9th, 1833. The writer is indebted to the kindness of Mr. Younge, for the note of this decision, which is inserted in 9 Bythewood's Convey. pp. 337, 338. It is also reported in a note to *Cradock* v. *Piper*, 1 Mac. & G. 668.

(*i*) See also *Willson* v. *Carmichael*, 2 Dow & Clark, 51; 1 Mac. & G. 678, 679; *Nicholson* v. *Tutin*, 3 Kay & J. 159.

(*k*) 3 M. & Cr. 45.

creating the trust may have directed that the trust moneys should be applied (*inter alia*) in payment of all expenses, disbursements and charges to be incurred, sustained or borne by the trustee, in professional business, journeys or otherwise, and that the trustee might retain all reasonable costs, charges and expenses which he might sustain or be put unto, such costs, charges and expenses to be reckoned, stated, and paid as between attorney and client. Again, in *Collins* v. *Carey* (*l*), where business relating to a trust estate had been transacted by two solicitors in partnership, one of whom was a trustee of the estate, Lord Langdale, M. R., held, that, in passing the accounts of the trustee, costs out of pocket alone could be allowed (*m*). And the general rule, that a trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket, has been firmly established by several subsequent decisions (*n*). And the rule is

Trustee acting as solicitor merely entitled to costs out of pocket:

(*l*) 2 Beav. 128.

(*m*) And the rule is the same, though the business be done by one of the partners who is not trustee: *Christophers* v. *White*, 10 Beav. 523.

(*n*) *Fraser* v. *Palmer*, 4 Y. & Coll. 515, *coram* Alderson, B.; 1 Mac. & G. 679; *Re Sherwood*, 3 Beav. 338; *Bainbrigge* v. *Blair*, 8 Beav. 588; *Todd* v. *Wilson*, 9 Beav. 486. The costs in such cases, of a defendant, are ordered to be taxed as between solicitor and client, without any special directions: *York* v. *Brown*, 1 Coll. 260: And under such an order, or under an order to tax costs generally, the taxing masters may take notice that the solicitor is also a trustee, and apply the rule: *Cradock* v. *Piper*, 1 Mac. & G. 664. But the rule does not preclude an executor who acts as solicitor in a cause in which he is a party in his representative character, from being allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive: *Burge* v. *Brutton*, 2 Hare, 373. See *Re Taylor*, 18 Beav. 165. And it must be observed, that the rule does not disentitle a solicitor, who is a trustee, from claiming his professional charges under a special contract, nor under a Will authorizing him expressly to make such charges: *Re Sherwood*, 3 Beav. 341; *Christophers* v. *White*, 10 Beav. 524, by Lord Langdale. See also *Broughton* v. *Broughton*, 5 De G. M. & G. 166, by Lord Cranworth; *Harbin* v. *Darby*, 28 Beav. 325; *post*, p. 1507. Where, however, a testator by his Will authorized any trustee thereof who might be a solicitor, to make the usual professional *or other proper and reasonable charges* for all business done and time expended in relation to the trusts of the Will, whether such business was usually within the business of a solicitor or not, it was held that the taxing master had power to allow a trustee, who was a solicitor, the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate: *Re Ames*, 25 C. D. 72; and cf. also *Re Fish*, [1893] 2

not restricted to cases of express trusts, but applies to the case of an executor or trustee, though there be no express trust (*o*). But the rule does not apply to the costs incurred *in a suit* where the solicitor acts in the suit for himself and his co-trustees: In such a case he shall be allowed the full costs which would be properly chargeable by a stranger to the trust, taking care that they are not to be increased by his being one of the parties (*p*).

but not as to costs incurred in a suit where solicitor acts for himself and co-trustees.

Ch. 413. But where the direction of the Will was that one of the executors and trustees should continue to act as solicitor in relation to the property and affairs of the testatrix, and should make his *usual* professional charges, and that notwithstanding his acceptance of the office of trustee and executor, he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of the Will, as if he, not being himself a trustee or executor, were employed by the trustee or executor, it was held that all items which were not of a strictly professional character ought to be disallowed: *Re Chapple*, 27 C. D. 584. And a clause in a Will entitling a trustee or executor, being a solicitor, "to charge and be paid all usual professional *or other* charges for any business done by him or his firm in relation to the management and administration of the estate, and carrying out the trusts, powers, and provisions of the Will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person," was held to enable a trustee to charge for any work done for the estate in the course of his profession or business, whether done in the ordinary course thereof or not, but not to authorize him to charge for work done outside his profession or business: *Clarkson* v. *Robinson*, [1900] 2 Ch. 722. Where a solicitor-trustee is an attesting witness of a Will, a declaration that he shall be allowed profit costs for transacting the business of the trust estate will not entitle him to such costs, the right to take such costs being a beneficial interest within sect. 15 of the Wills Act: *Re Barber*, 31 C. D. 665, approved by the Court of Appeal in *Re Pooley*, 40 C. D. 1. So, if the estate be insolvent, a clause in the Will empowering the solicitor to charge profit costs will not entitle him to them, such clause being in effect a legacy: *Re White*, [1898] 1 Ch. 297; 2 Ch. 217; *post*, p. 1502. Compensation may, in special cases, be made, under the authority of the Court, to a trustee acting as solicitor in the trust matters; though not by allowing him to make the usual professional charges: *Bainbrigge* v. *Blair*, 8 Beav. 588.

(*o*) *Pollard* v. *Doyle*, 1 Drew. & Sm. 319.

(*p*) *Cradock* v. *Piper*, 17 Sim. 41; 1 Mac. & G. 664. See also the observations of Lord Cranworth on this case in *Broughton* v. *Broughton*, 5 De G. M. & G. 164, 165; and see *Re Barber*, 34 C. D

This exception, however, in favour of the solicitor, does not extend to a case where a solicitor, who is a trustee, acts in a suit

77, in which case Chitty, J., after stating the rule as to solicitors not being entitled to profit costs, says: "Consequently, if an executor, being a solicitor, acts solely for himself, or acts for himself and his co-trustee in the business of a trust, he, in the absence of any provision to the contrary in the instrument creating the trust, is not entitled to receive out of the trust estate profit costs. That is the rule where the business is done not in a suit but out of Court; the same rule applies where the solicitor does business in Court, acting for himself as solicitor, where he is plaintiff in an action, and also where he is the defendant. He is allowed, however, to act as solicitor for *cestuis que trustent* in an action, because that is not part of the business of the trust properly so called, and in cases where the *cestuis que trustent* obtain as they sometimes do, in fact generally do, out of the trust estate, their costs, the solicitor who acted for them is not deprived of his proper bill of costs by reason of his also being a trustee." This question of the right of a solicitor-trustee to charge profit costs was much considered by the Court of Appeal in the case of *Re Corsellis*, 34 C. D. 675. In that case it was held (1) that the firm of the solicitor-trustee was entitled to profit costs made in acting for the trustees who were respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the Court, such costs coming within the rule of *Cradock* v. *Piper;* (2) that profit costs made by the firm of the solicitor-trustee when acting for a receiver appointed in an administration action, the solicitor-trustee being the defendant in the action, could not be retained by the firm, on the principle that the trustee's interest and duty conflicted; (3) that profit costs made by preparing leases and agreements for leases of parts of the trust estate could not be retained, because, although actually paid by the lessees, the solicitors were employed on behalf of the trust estate; and (4) that steward's fees of a manor which formed part of the trust estate, and of which trustees had appointed a partner in the firm steward, might be retained, even though such fees were brought into the partnership account. The Court of Appeal, in this case, while disapproving of the decision in *Cradock* v. *Piper*, expressly refused to depart from a rule so long followed, or to fritter away the decision by saying that it only applied to a hostile action. Cotton, L. J., in his judgment, (p. 681), thus sums up the general principle: "It is a well-established rule, and one founded on sound principles, that a trustee who is a solicitor, cannot as a rule, make any profits as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. There is one very obvious principle which applies, namely, that the trustee must discharge his duty without making any profit out of it. If there is business which a layman cannot properly perform, he may employ a solicitor to do

for himself alone, or by his partner for himself alone (*q*), nor to a case of a solicitor, being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust *out of Court* (*r*). And where an executor and trustee under a Will employs his co-trustee, who is a solicitor, to transact the legal business of the trust, the solicitor is only entitled to costs out of pocket (*s*).

A solicitor, who is sole executor and trustee of a Will, is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the Will contains a clause declaring that he should be the solicitor to the estate, and should be allowed to charge for work done as such solicitor; for the clause is in effect a legacy of profit costs to the solicitor, and being bounty he cannot claim it as against creditors. And this rule extends to all professional trustees (*t*).

When executor entitled to commission.

An agent, who is appointed executor of his principal, is not entitled to charge commission on business done subsequently to

that legal business. If it is business which a trustee in his position cannot be expected to discharge, such as receiving rents from a number of small properties, he may employ an agent to collect those rents, but if he chooses to do work, he cannot make a charge against the estate; that is the rule as regards work done out of Court by a trustee, whether acting for himself or for the other trustee as well. From the rule I have stated one exception was established by *Cradock* v. *Piper*: that is to say, where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee. For that there is an obvious reason—that it is not the business of a trustee although he is a solicitor, to act as solicitor for his co-trustee. But the exception in *Cradock* v. *Piper* is limited expressly to the costs incurred in respect of business done in an action or a suit." But a solicitor cannot be entitled to profits made directly or indirectly through his office of trustee, unless he is actually the solicitor on the record. He cannot stipulate for a commission with a firm of solicitors to whom he introduces the trust business: *Vipont* v. *Butler*, W. N. (1893) 64.

(*q*) *Lyon* v. *Baker*, 5 De G. & Sm. 622.

(*r*) *Lincoln* v. *Windsor*, 9 Hare, 158.

(*s*) *Broughton* v. *Broughton*, 5 De G. M. & G. 160; 2 Sm. & G. 422.

(*t*) *Re Thorley*, [1891] 2 Ch. 613; *Re White, Pennell* v. *Franklin*, [1898] 1 Ch. 297; 2 Ch. 217.

the testator's death (*u*). So an executor, who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate (*x*). So an executor, who acts as auctioneer in the sale of assets, is not entitled to charge commission (*y*). But where a testator, a victualler, directed his trade to be carried on by his executors, brewers and spirit merchants, who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them, the Court would not declare that the executors were entitled to receive the cost price only for these supplies, but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price (*z*). So in *Willis* v. *Kimble* (*a*), a testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he declared, that his trustees respectively should be entitled to have and receive out of the trust-moneys, all costs, charges, and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained, or occasioned in or about the execution of the said trusts, or in anywise relating thereto: One of the trustees was a land surveyor, and he superintended the management and sale of the estates: And Lord Langdale, M. R., held, that he was entitled, upon the terms of the Will, to a compensation for loss of time. Again, it is competent for the Court to appoint an executor and trustee consignee with the usual profits (*b*). And when the Court, in its discretion, has made such an appointment, and the appointment has been acted upon, the Court will not afterwards withdraw its sanction from it (*c*).

Judicial Trustee Act, 1896, s. 1 (5).

The Judicial Trustee Act, 1896 (*d*), now provides that, where a judicial trustee is appointed, there may be paid to him out of the trust property such remuneration, not exceeding the limits prescribed by the rules for the time being in force under the Act, as the Court may assign in each case, subject to any rules under the Act respecting the application of such remuneration

(*u*) *Sheriff* v. *Axe*, 4 Russ. Chanc. Cas. 33.

(*x*) *Heighington* v. *Grant*, 5 M. & Cr. 258, 262.

(*y*) *Kirkman* v. *Booth*, 11 Beav. 273. Nor if he is a partner with others, can the partnership make a charge: *Matthison* v. *Clarke*, 3 Drew. 3.

(*z*) *Smith* v. *Langford*, 2 Beav. 362.

(*a*) 1 Beav. 559.

(*b*) *Marshall* v. *Holloway*, 2 Swanst. 432.

(*c*) *Morison* v. *Morison*, 4 My. & Cr. 215.

(*d*) 59 & 60 Vict. c. 35, s. 1 (5).

where the judicial trustee is an official of the Court, and that the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

Commission on remittances from India to this country by testator.

It has been holden that agents, being also appointed executors, are not entitled to commission upon remittances from India to this country by the testator, not received until after his death (*e*). The Courts of India, in order to induce proper persons to accept the office of executor, at one time adopted a rule, opposed to the principles above stated, by permitting an executor to charge a commission upon the amount of assets collected by him in India. And if assets, collected in India, came to be administered, not in India, but by the Courts in England, the Courts here were of necessity bound to follow that rule of policy which was adopted in India. But by the Indian Act, No. II., of 1874, re-enacting Act No. XXIV. of 1867, it is provided (sect. 56) that no person other than the Administrator-General, acting officially, shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona* granted by the Supreme Court or High Court of Judicature at Fort William in Bengal, since the passing of Act No. VII. of 1849, or by either of the Supreme or High Courts of Judicature at Madras and Bombay, since the passing of Act No. II. of 1850, or by any Court of competent jurisdiction within the meaning of sects. 187 and 190 of the Indian Succession Act, 1865; but this enactment shall not prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor or by way of commission or otherwise. Sections 52—55 prescribe the commission to which the Administrator-General is entitled (*f*).

The same exception to the general rule was established with respect to the West Indies. The principle upon which the Court of Chancery has gone, in this respect, appears to be this:

(*e*) *Hovey* v. *Blakeman*, 4 Ves. 596. However, in *Scattergood* v. *Harrison*, Mosely, 130, Lord King held, that where a factor was made executor, if anything appeared to have been consigned to him by the testator in his lifetime, though it came to his hands after his death, since the executor acted as factor, he should be allowed commission for it.

(*f*) See a pamphlet by Mr. Broughton, late Administrator-General of Bengal, on "The Custody and Preservation of the Property in India of Deceased Persons."

That the commission is in the nature of a remuneration to a trustee, who, besides the usual trouble belonging to the execution of his trust, has also to undergo all the inconveniences arising from being in a foreign country, and conducting the business of a merchant there: And although, as it has above appeared, no commission is allowed to a trustee in this country for what he does, however laborious his duty may be, yet inasmuch as it is of great importance to get persons to assume the character of trustees in the East and West Indies, therefore, so long as they are actually in the country there discharging the duty of trustees, the Court allows the commission (*g*). But no commission is payable where the remittant himself is actually, at the time of the remittance, in this country (*h*): And it would seem, that, in order to entitle himself to the commission, the party must himself be actually in the colony where the remittance was made: For if, by any means, money, which has not been received by him upon the spot and remitted by him from the spot to this country, is remitted to this country, it appears to be the settled rule of the Court of Chancery, that the commission shall not be allowed (*i*). And accordingly, in *Campbell* v. *Campbell* (*k*), it was held that if an executor in India collected part of the assets there, and then came to England, and had the remainder remitted to him by his agent, he was entitled to commission on that part only which he had collected in India.

Allowances for payments to collectors, &c.

Although an executor who has proved the Will, or a person taking out letters of administration, cannot retire from his duty, but must, generally speaking, collect the estate himself (*l*), yet an executor is justified in having recourse to an agent to collect the assets, in cases where a provident owner might well employ

(*g*) 1 Moo. P. C. 40.

(*h*) 4 Ves. 72; *Ibid.* 596.

(*i*) *Chambers* v. *Goldwin*, 5 Ves. 834; *Denton* v. *Davy*, 1 Moo. P. C. 15, 32. In this last case it was holden by the Lords of the Privy Council, that the commission of 6 per cent. given by the Jamaica Act, 24 Geo. II. c. 19, to agents, trustees, guardians, executors, &c., for the management and disposal of the rents and profits of an estate, being in the nature of a remuneration for the trouble and responsibility of conducting the business of a merchant on the island, is payable only to persons actually resident on the island, and capable and willing to act in the trusts of the estate; and the commission of 5 per cent. given by the same Act for receiving and remitting moneys can only be claimed where the receipts or payments are actually made on the island.

(*k*) 13 Sim. 168.

(*l*) *Weiss* v. *Dill*, 3 M. & K. 26.

a collector: and the executor will, therefore, be allowed the expense so incurred, in his accounts (*m*). Accordingly, where a testator gave annuities to his executors for their trouble in the execution of his Will, and died possessed of several houses, let at weekly rents, it was held, that the executors were justified in paying a person to collect the rents, and did not, therefore, lose their annuities (*n*). So if there are assets in India, the executor shall be allowed the expense of an agent to collect them: And, therefore, the Court will appoint a receiver in India of a testator's assets on the application of an executor resident in England (*o*).

So from the nature of the accounts, the executor may be justified in employing an accountant, and the expense will in a proper case be allowed to the executor (*p*).

Executor may employ a solicitor:

Again, if an executor pays an attorney for his trouble and attendance, in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays (*q*). But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bonâ fide*, to the solicitor to the trust; and the officer of the Court, without

(*m*) See *Bonithon* v. *Hockmore*, 1 Vern. 316; *Davis* v. *Dendy*, 3 Mad. 170. See also *Hopkinson* v. *Roe*, 1 Beav. 180, in which case Lord Langdale, M. R., held, that the executors under the circumstances were justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble: But the costs of transferring funds, from the name of a testator into the names of the executors, were disallowed: And his Lordship held, that the sum to be allowed executors for the expenses of transferring a large sum of money into Court is one guinea; and extra brokerage was, therefore, disallowed. But where an executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stock-broker for identifying him (the executor) at the bank, it was held, that he ought to be allowed this payment: *Jones* v. *Powell*, 6 Beav. 418.

(*n*) *Wilkinson* v. *Wilkinson*, 2 Sim. & Stu. 237. *S. P.*, as to an administrator, *Trezevant* v. *Frazer*, Hil. Term, 1832, before Sir L. Shadwell, V.-C. So, even at law, it would seem, that an executor, under a plea of *plene administravit*, will be allowed the reasonable charges of collecting the testator's debts: *Giles* v. *Dyson*, 1 Stark. N. P. C. 32.

(*o*) *Cockburn* v. *Raphael*, 2 Sim. & Stu. 453: But the receiver must give sureties resident in England: *Ibid.*

(*p*) *Henderson* v. *M'Iver*, 3 Madd. 275.

(*q*) *Macnamara* v. *Jones*, Dick. 587. In *Stackpoole* v. *Stackpoole*, 4 Dow. P. C. 226, an administrator was not allowed to set off a charge for poundage alleged to have been paid to his agent in the administration.

regularly taxing the bill, will moderate their amount (*r*). And it may here be observed, that an executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to do himself. And therefore, where a solicitor is appointed executor, and is to be at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances, to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees and creditors (*s*).

but he will not be allowed charges of solicitor for doing things which executor ought strictly to do himself.

Under sect. 39 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), in any case in which a trustee, executor, or administrator has become chargeable with any solicitor's bill of costs the judge has a discretionary power, upon the application of a party interested (*ss*) in the property out of which such trustee, executor or administrator may have paid or be entitled to pay such bill, to refer the same to be taxed and settled, and to make such order as he may think fit for the payment of what may be found due, and of the costs of the reference, to or by the solicitor by or to the party making such application, having regard to the provisions in the Act contained relative to applications for the like purpose by the party chargeable with such bill so far as the same shall be applicable to such cases; or the order may be made for payment to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such solicitor in respect of such bill he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such solicitor had. If the bill has already been taxed and settled, sect. 40 requires special circumstances to be shown to entitle the applicant to a retaxation; and under sect. 41 special circumstances should be shown for an order for taxation after payment of the bill. Orders under sect. 39 are made on summons, and not *ex parte* (*t*). The taxation is as between

Solicitors Act, 1843, 6 & 7 Vict. c. 73, s. 39: Taxation on application of a party interested.

(*r*) *Johnson* v. *Telford*, 3 Russ. Chanc. Cas. 477.

(*s*) *Harbin* v. *Darby*, 28 Beav. 325; *Re Chapple*, 27 C. D. 584. For the general rule as to an executor's costs, and as to his "charges and expenses," and what are "just allowances," see *post*, p. 1552 *et seq.*

(*ss*) A creditor who has obtained judgment for the administration of the estate of a deceased testator is "a party interested" within the meaning of this section: *Re Jones and Everett*, [1904] 2 Ch. 363.

(*t*) *Re Straford*, 16 Beav. 27.

solicitor and client, but subject to this limitation, that a solicitor cannot charge against a trust estate anything not necessary for the administration thereof, though expressly directed by the trustee, but must look for payment of such charges to the trustee personally (*u*). The amount allowed by a taxing master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate (*x*). By virtue of the proviso in sect. 41, taxation will not be ordered under sect. 39 where the application is not made within twelve calendar months after payment; regard being had to what must now be treated as the settled practice of the Court (*y*): But the trustee, executor, or administrator may be made to account in an action, in which case the taxing master, without having it referred to him for taxation, would be directed to inquire whether any items objected to were fair and proper to be allowed, and to what amount (*z*). So also if a solicitor carries in a claim in an administration action in respect of a bill of costs delivered more than twelve months the executor is not estopped from disputing any of the items (*a*).

Allowance of interest to executor for money advanced by him.

With respect to the allowance of interest to executors upon sums advanced by them for the purposes of their trust, it has been held, that if an executor borrows money, or advances it out of his own pocket, to pay the debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled not only to be paid in full in priority to the creditors (*b*), but also to an allowance of interest for the money so advanced or borrowed (*c*). It may be observed, that it is contrary to the course of practice to allow interest to an executor on costs paid by him, pending a suit regarding the estate (*d*). Where interest is allowed on sums carrying interest, it should be calculated from the time of a balance being struck on the general report, notwithstanding that the postponement may

(*u*) *Re Brown*, L. R. 4 Eq. 464; and cf. *Re Negus*, [1895] 1 Ch. 73; *Re Gray*, [1901] 1 Ch. 239; and *Re Longbotham & Sons*, [1904] 2 Ch. 152, where same principle was recognized on a taxation under sect. 38.

(*x*) *Brown* v. *Burdett*, 40 C. D. 211.

(*y*) *Re Wellborne*, [1901] 1 Ch. 312.

(*z*) *Allen* v. *Jarvis*, L. R. 4 Ch. 616.

(*a*) *Re Park*, 41 C. D. 326.

(*b*) *Spackman* v. *Holland*, 2 Giff. 198.

(*c*) *Small* v. *Wing*, 5 Bro. P. C. 72 Toml. edit.

(*d*) *Gordon* v. *Trail*, 8 Price, 416; *Lewis* v. *Lewis*, 13 Beav. 82.

give rise to hardship; for, until that time, it cannot be ascertained that the executor had not the money in his hands (*e*).

Executor receiving money, to which he is not entitled, must refund, although he has paid it away to creditors.

In *Pooley* v. *Ray* (*f*), a mortgage came to an executor who received the mortgage-money, and paid it away to his testator's creditors: Afterwards it appeared, that the mortgage had been satisfied in the testator's lifetime: And Lord Cowper held, that the executor must refund, although he had before paid the money away in debts, which he had not otherwise assets to pay, and that he must have his remedy against such creditors as by mistake he had paid: His Lordship observed, that "though this might be a hard case, yet if the plaintiffs had a right to be paid their money, which they had overpaid on the mortgage, this right could not be overthrown by the defendant, the executor, applying the money in any manner he should think fit; any more, than if an executor at law should recover a debt, and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error; the executor must restore the money to the plaintiff in error; and his having paid it away, in debts of his testator, will not excuse him from paying it back. So in the same manner, if there were a decree for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts, and then the defendant, against whom the executor had recovered the decree, brings an appeal, and reverses the decree; the plaintiff in the appeal shall be restored to the money."

This doctrine of Lord Cowper was approved of by Lord Alvanley, in *Pickering* v. *Stamford* (*g*), but his Lordship remarked, that it would be otherwise, if the defendant had delayed the appeal, and willingly stood by, while the executor paid away the money; for that would be drawing the executor into a snare.

What an executor may be charged with under a reference of just allowances.

It may be proper in this place to mention the case of *Brown* v. *Spooner* (*h*). There the testator gave an annuity of 50*l.* to be purchased by his executor, and directed him to pay the annuitant 40*l.* a year until it was purchased: The executor, instead of purchasing, paid 50*l.* a year from the testator's rents: And Lord Thurlow held, that although the executor was bound to purchase the annuity immediately after the expiration of the first year from the testator's death, and therefore the Court

(*e*) *Gordon* v. *Trail*, 8 Price, 416.
(*f*) 1 P. Wms. 355.
(*g*) 2 Ves. 583.
(*h*) 1 Ves. 291.

might charge him for the overpayment from the estate, yet the Master, on a general reference of just allowances, could not do so. So in *Garland* v. *Littlewood* (*i*), a case was alleged, on the pleading, to charge executors for what they might, but for their wilful default, &c., have received: At the hearing the common accounts only were directed against them: The case coming on for further directions on the Master's report, Lord Langdale, M. R., held that the executors would not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the Master's report laid a foundation for such an inquiry.

When an executor may be charged on the footing of wilful default.

Just allowances are now made in any account directed by any order or judgment without any direction for the purpose (*k*). Accounts, on the basis of wilful default, are still not made on a common administration judgment or order (*l*), but the principle laid down in *Garland* v. *Littlewood* seems to have been departed from. The old practice was that a decree on the footing of wilful default could not be got except at the hearing; now it seems, that if wilful default is charged in the pleadings and evidence of it is adduced, accounts and inquiries on that footing may be directed at any stage of the proceedings, although the judgment at the trial gives no relief on that footing, provided, however, the claim to such relief has not been dismissed (*m*).

By Ord. XXXIII. r. 2 of R. S. C. 1883, it is provided that:—"The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

This rule does not enable a Judge to make an order against an executor or administrator on the footing of wilful default either at the hearing or at any subsequent time, unless wilful default has been pleaded; but where wilful default has been alleged and a case is made for it on the pleadings, an account on the footing of wilful default can be directed either

(*i*) 1 Beav. 527.

(*k*) R.S.C. 1883, Ord. XXXIII., r. 8.

(*l*) *Laming* v. *Gee*, 10 C. D. 715.

(*m*) *Re Symons*, 21 C. D. 757.

at the hearing or trial of the action or at any subsequent stage (*n*).

If wilful default has not been charged in the pleadings and in the course of the inquiries directed a case of wilful default is disclosed, it would seem that by the leave of the Court fresh proceedings may be taken charging wilful default in the same way in which, under the old practice, a supplemental bill could be filed (*o*).

Where the account directed by the order is what is known as a "common account," the trustee is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received. Consequently, if an investment is made in improper securities not authorised by the terms of the Will or the general law, the trustee is not allowed to discharge himself on account of that investment, and he is charged in respect of it on the common account. To this extent a breach of trust can be dealt with on originating summons, notwithstanding the rule that in any contested case an originating summons is not the proper mode of deciding the question (*p*).

(*n*) *Barber* v. *Mackrell*, 12 C. D. 534, 538, *per* Fry, J. See also *Job* v. *Job*, 6 C. D. 562, as explained in *Mayer* v. *Murray*, 8 C. D. 424; *Re Symons*, 21 C. D. 757.

(*o*) *Laming* v. *Gee*, 10 C. D. 715. And see *Dowse* v. *Gorton*, [1891] A. C. 190, 204, *per* Lord Macnaghten.

(*p*) *Re Stuart*, 74 L. T. 546; *Re Newland*, W. N. (1904) 181.

PART THE FIFTH.

OF REMEDIES.

BOOK THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

IN a previous part of this Treatise (*a*), there has been occasion to investigate, what rights of action are comprised in the estate of an executor or administrator: It remains to consider the remedies by which those rights may be enforced.

It has been thought desirable in the following four chapters to keep the former headings "At Law" and "In Equity."

CHAPTER THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS AT LAW.

Instances where the executor has not the remedy.

IT must be observed, in the commencement of this subject, that there are some cases where an executor or administrator, although he has an interest in a *chose in action*, is not entitled to the remedy: Thus, where one of two *joint* obligees, covenantees (*b*), or partners dies, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined (*c*), nor can he

(*a*) *Ante*, p. 602 *et seq.*

(*b*) See as to the effect of a covenant with two or more jointly, sect. 60 of the Conveyancing and Law of Property Act, 1881.

(*c*) See generally as to joinder of parties, R. S. C., Ord. XVI.

sue separately: For example, two joint merchants appoint a person to be their factor: one dies, leaving an executor; this executor and the survivor cannot join in an action against the factor; for the remedy survives, though not the duty; and therefore, on the recovery, the survivor must be accountable to the executor for that (*d*). And the general rule is that though the right of a deceased partner devolves on his executor (*e*), yet the *remedy* survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased (*f*).

Again, where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives, upon the death of the latter, and the executor or administrator of the deceased cannot be made a party, or sue separately: Thus, in *Anderson* v. *Martindale* (*g*), there was a covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life: and it was held, that this was a joint covenant to A. and B., in which they had joint legal interest, although the benefit was for A. only; and that therefore, on the death of A., the right of action survived to B., and A.'s administrators could not sue on the covenant (*h*).

It follows, that where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who died before him cannot be joined.

But if the interest of the covenantees is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living: And if the *interest* be several, it shall make no difference that the *language* of the covenant is joint: Thus, in *Withers* v. *Bircham* (*i*), by deed reciting the grant of two distinct annuities

(*d*) *Martin* v. *Crump*, 1 Lord Raym. 340; 2 Salk. 444.

(*e*) *Ante*, pp. 486, 638.

(*f*) *Martin* v. *Crump*, *ubi supra*; *Kemp* v. *Andrews*, Carth. 171; *Golding* v. *Vaughan*, 2 Chit. Rep. 437, *per cur.*; *Rex* v. *Collectors of Customs*, 2 M. & S. 225, by Dampier, J.; 2 Saund. 117, note to *Coryton* v. *Litheby*. Cf. *ante*, p. 1371, as to the case of *Hall* v. *Huffam*, 2 Lev. 228.

(*g*) 1 East, 497.

(*h*) See *Barford* v. *Stuckey*, 2 Brod. & Bingh. 333.

(*i*) 3 B. & C. 254; cf. *Eccleston* v. *Clipsham*, 1 Saund. 154; and see *White* v. *Tyndall*, 13 A. C. 263, in

to A. and B. during the life of the grantors and the survivor, it was witnessed, that C. covenanted with A. and B. and their executors, to pay the annuities, or either of them, when the grantors should make default in payment: A. died: And it was held, that, the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship above stated will be enforced, although the covenant be in terms joint and several (*k*).

The rule is the same with respect to remedies in form *ex delicto* as those in form *ex contractu*: Therefore, if one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately (*l*).

Executor of solicitor bringing action on his bill: taxation of bill of deceased solicitor.

By the 37th section of the stat. 6 & 7 Vict. c. 73, it is enacted that no action shall be brought by any attorney or solicitor, or *by their executors, administrators*, or assignees, for the recovery of any fees, &c., until the expiration of one month after the delivery of a bill, &c., and upon the application of the party chargeable (*m*) with the bill delivered, the bill and the attorney's or solicitor's, *or his executor's or administrator's*, or assignee's demand thereon, may be referred to be taxed; and if the bill, when taxed, be less by a sixth part than the bill delivered, then

which the House of Lords refused to treat a joint covenant in a lease as several, merely because the demise was to two as tenants in common. And Lord Fitzgerald pointed out that the rule that the covenant shall be measured and moulded according to the interest of the covenantees had no application to the case of separate interests in covenantors. Where, however, two persons agreed to assign certain patents, and the assignments were to "contain a covenant by the vendors" that the patents were valid, &c., it was held that the covenants ought to be joint and several, and the administratrix of one of the covenantors was held liable: *National Society* v. *Gibbs*, [1900] 2 Ch. 280 (C. A.).

(*k*) See the authorities cited in the note to *Eccleston* v. *Clipsham*, 1 Saund. 154. See also 3 B. & C. 256; and *Lane* v. *Drinkwater*, 1 Cr. M. & R. 599, where, however, the covenant was joint only.

(*l*) *Ante*, p. 638.

(*m*) The personal representative of the party chargeable, though not named, may also make the application: *Jefferson* v. *Warrington*, 7 M. & W. 137.

the attorney, his *executor*, *administrator*, or assignee, shall pay the costs (*n*).

By sect. 38 where any person, not the party chargeable, shall be liable to pay or shall have paid the bill, he or his personal representative may apply to have it taxed just as if the application were made by the party chargeable (*o*).

Parties.

If there are several executors or administrators, they must all join in bringing actions at law (*p*), though some be within the age of seventeen years (*q*), or have not proved the Will (*r*). Where, however, an executor renounces probate, or, being cited to take probate, does not appear, his rights in respect of the executorship shall wholly cease, and the representation of the testator devolve as if he had not been appointed (*s*), and he, therefore, need not be a plaintiff. Nor is an absconding executor a necessary party (*t*).

But if one alone of several executors or administrators brought an action either in form *ex contractu* or *ex delicto*, the defendant could formerly only take advantage of it by pleading in abatement (*u*).

Now by R. S. C., 1883, Ord. XXI. r. 20, no plea or defence shall be pleaded in abatement, and by Ord. XVI. r. 11, "No

(*n*) If a solicitor dies pending an order for taxation, the proceedings may be revived by the client against the solicitor's representatives by an *ex parte* order: *Re Nicholson*, 29 Beav. 665; and they may, in the same way, revive the proceedings against the client: *Re Waugh*, *ibid.* 666.

(*o*) As to taxation under sect. 39, upon the application of a party interested, see *ante*, p. 1507.

(*p*) Bro. Exors. 88.

(*q*) *Smith* v. *Smith*, Yelv. 130.

(*r*) *Brookes* v. *Stroud*, 1 Salk. 3. See, as to the necessary parties to an action by executors in equity, *post*, p. 1541.

(*s*) 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16.

(*t*) *Drage* v. *Hartopp*, 28 C. D. 414. As to parties generally, see R. S. C. 1883, Ord. XVI., *post*, p. 1545.

(*u*) 1 Saund. 291, *l.* note; *Tuckey* v. *Hawkins*, 4 C. B. 655. Apparently, since the Judicature Act, the only mode of taking the objection of non-joinder of one of several executors as a plaintiff is by taking out a summons to add the executor as a plaintiff: *Werderman* v. *Société Générale d'Electricité*, 19 C. D. 246. The objection cannot be raised by plea in abatement or by demurrer, and the Court will never dismiss an action for want of parties. In some cases, if a person who ought to be a plaintiff refuses, the Court will make him a defendant: *Luke* v. *South Kensington Hotel*, 11 C. D. 121; *Van Gelder & Co.* v. *Sowerby Bridge, &c.*, 44 C. D. 374; *Fairclough* v. *Marshall*, 4 Ex. D. 37. As to the old practice, see 8th Edition of this Work, p. 1875, note (*r*).

cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff, suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto."

It must be observed that if one executor of several alone sell goods of the testator, he alone may maintain an action for the price, not naming himself executor (*x*). So if goods be taken out of the possession of one of several executors, he may sue alone to recover them (*y*). And, generally, if one executor alone contracts on his own account alone, he *must* sue alone on such contract, notwithstanding the money recovered will be assets (*z*).

It is clear that where two out of three co-executors grant a lease of their testator's property, as the whole estate is in each, the whole property passes, and the two alone may recover the property in ejectment on a joint claim (*a*).

Process.

Indorsement of writ.

Executors may sue and be sued as representing the estate.

Formerly, though the plaintiff sued as executor or administrator, the writ of summons need not have stated his special character. But R. S. C., 1883, Ord. III. r. 4, provides that if the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement of claim shall show in what capacity the plaintiff or defendant sues or is sued. And Ord. XVI. r. 8, provides that "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or

(*x*) Godolph. Pt. 2, c. 16, s. 1; Wentw. Off. Ex. 224, 14th edit.; *Brassington* v. *Ault*, 2 Bingh. 177.

(*y*) Godolph. *ubi supra;* Wentw. Off. Ex. *ubi supra.*

(*z*) *Heath* v. *Chilton*, 12 M. & W. 632, *ante*, p. 663.

(*a*) *Doe* v. *Wheeler*, 15 M. & W. 623.

representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties" (*b*). By R. S. C. November, 1893, this rule was amended so as to be made expressly applicable to trustees, executors, and administrators sued in proceedings to enforce a security by foreclosure or otherwise (*c*).

Claims by or against an executor or an administrator as such, may be joined with claims by or against him personally.

By R. S. C. 1883, Ord. XVIII. r. 5, it is enacted that, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

Claim: when executor shall claim as such.

Every action brought by an executor or administrator, where the cause of action accrues in the time of the deceased, must be brought in his representative capacity (*d*). But where the cause of action accrues after the death of the testator or intestate, the executor or administrator may sue as such, or not, at his option (*e*). Thus, there has already been occasion to show (*f*), that, in respect of injuries done to the goods and chattels of the testator, after his death, the executor has his option, either to sue in his representative capacity or to bring the action in his own name and in his individual character. So it has already appeared, with respect to contracts made with the executor or

(*b*) Where an administration order has been made, the Judge of the Chancery Division in whose Court such administration is pending may order the transfer to himself of any cause or matter pending in any other Court or Division brought by or against the executors or administrators of the testator or intestate whose assets are being administered: R. S. C. 1883, Ord. XLIX. r. 5. In *Chapman* v. *Mason*, 40 L. T. 678, it was decided that an action in another Division against an executor will not be transferred under this rule if he is to be deemed personally liable; but in *Re Timms*, 26 W. R. 692, the action was ordered to be transferred to the Chancery Division.

(*c*) This rule was apparently amended in consequence of the decision in *Francis* v. *Harrison*, 43 C. D. 183. This rule is subject to rr. 1, 8 and 9 of the same Order (see r. 7); and see *Whitworth* v. *Darbyshire*, 68 L. T. 216. Rr. 1, 8 and 9 of Ord. XVIII. relate to the subject of the joinder of different causes of action.

(*d*) 1 Saund. 112, note to *Dean of Bristol* v. *Guyse;* Com. Dig. Pleader (2 D. 1); *Gallant* v. *Bouteflower*, 3 Dougl. 36, by Buller, J.

(*e*) 3 Dougl. 36, by Buller, J.

(*f*) *Ante*, p. 659 *et seq.*

administrator in that character, that the same option exists, wherever the money recovered will be assets (*g*).

Profert of letters of administration or probate unnecessary since the Common Law Procedure Act:

It was formerly necessary for an executor, when he declared as such, to make a *profert in curiâ* of the letters testamentary; and for an administrator to make a *profert* of the letters of administration with a statement of the grant of the latter. But by the Common Law Procedure Act, 1852, sect. 55, "It shall not be necessary to make *profert* of any deed or other document relied on in any pleading, and if *profert* shall be made, it shall not entitle the opposite party to crave oyer, or set out upon oyer such deed or other document."

oyer abolished:

Before the law was thus altered, if an executor, declaring as such, made *profert* of the letters testamentary, not having, in fact, at that time obtained probate, the defendant, in order to raise the objection, must have demanded oyer; for if he had pleaded that the plaintiff never was nor is executor in manner and form as alleged in the declaration, the plaintiff would have succeeded on this issue, if he had obtained probate at any time before the trial (*h*); but by demanding oyer, the defendant made it impossible for the plaintiff to proceed, till he could produce the probate. The alteration of the law as to *profert* and oyer, has rendered this course impracticable; and it may place a debtor to the deceased in a situation of some hardship and difficulty, if he is sued for the debt by one assuming to be the executor of the creditor, but who has not proved the Will. For if the debtor pays the debt into Court, he may be paying it to one who perhaps may never acquire a title to it by obtaining probate, and so be forced to pay it over again: On the other hand, if he pleads *ne unques executor*, and goes to trial of an issue joined on that plea, and the plaintiff has obtained probate in the meantime, it will, by relation, sustain the plaintiff's title to maintain the action, and the debtor will have to pay all the costs of the suit, though he has never disputed the debt and always been willing to pay it, if he could ascertain the person who was authorized to receive it. In order, therefore, to protect a defendant under such circumstances, the Court, on its being shown that the plaintiff, who has declared or claims as executor, has not obtained probate, will stay proceedings until probate

(*g*) *Ante*, p. 661 *et seq.* See also *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346; *Moseley* v. *Rendell*, L. R. 6 Q. B. 338.

(*h*) *Thompson* v. *Reynolds*, 3 C. & P. 123. See *ante*, p. 221.

shall have been taken out and a reasonable time has elapsed after it shall have been submitted to the inspection of the defendant (*i*).

Set-off.

By R. S. C. 1883, Ord. XIX. r. 3, "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." But this rule gives no right of set-off where none existed before the passing of the rule (*k*). And the cases on the repealed statutes of set-off (2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4), which enacted that where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, would seem still to be applicable, except in so far as they conflict with the rules of equity. These cases have established that in an action by an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator (*l*): And the same rule holds where the plaintiff claims, *as executor*, for a debt due after the death of the testator (*m*). Again, if a stranger receives rent

(*i*) *Webb* v. *Adkins*, 14 C. B. 401; *Tarn* v. *Commercial Banking Co. of Sydney*, 12 Q. B. D. 294.

(*k*) *Re Milan Tramways Co.*, 22 C. D. 122; 25 C. D. 587.

(*l*) *Shipman* v. *Thompson*, Willes, 103; *Tegetmeyer* v. *Lumley*, 25 G. 3, B. R., reported in Durnford's note to *Hutchinson* v. *Sturges*, Willes, 264. So it was held, by Romilly, M. R., that where a creditor had purchased part of the intestate's goods from his administrator, he could not set off the price against a debt due to him from the intestate at his decease: *Lambarde* v. *Older*, 17 Beav. 542; cf. *Wrout* v. *Dawes*, 25 Beav. 369.

(*m*) *Kilvington* v. *Stevenson*, cited by Erskine from Yates' MS. in *Tegetmeyer* v. *Lumley*, *ubi supra*; *Schofield* v. *Corbett*, 11 Q. B. 779; *Rees* v. *Watts*, 11 Exch. 410, affirming *Watts* v. *Rees*, 9 Exch. 696, and disapproving *Mardall* v. *Thellusson*, which was subsequently overruled by the Court of Exchequer Chamber, 6 E. & B. 976. These decisions turned on the terms of the stat. 2 Geo. II. c. 38. The rule that a creditor of a testator cannot set off a debt due to him from the testator against a debt that became due from him to the executor of the testator is the same in equity: *Hallett* v. *Hallett*, 13 C. D. 232; *Lambarde* v. *Older*, 17 Beav. 542. Thus where G. died insolvent, having mortgaged an estate for his own life to secure an annuity

due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct such payment in an action, by the executor, for the rents received; but he cannot deduct a payment of ground rent arising after the death of the testator (*n*).

In *Henderson* v. *Henderson* (*o*), an action was brought on a decree on the equity side of the Supreme Court of Newfoundland, awarding a sum of money to be paid by the defendant to the plaintiff; and the defendant, by his plea, after alleging that the plaintiff had sued in the Supreme Court, as the representative of a deceased person, proceeded to rely on a set-off for debts due from the deceased, or his estate, to the defendant: And it was held that this plea was bad; because the plaintiff was now suing in his own right, and the defence, if available at all, was one which ought to have been made in the Supreme Court.

There is no right either at law or in equity to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker (*p*).

A defendant cannot set off a debt due to him from the

granted by himself for his own life, and had also mortgaged a policy on his own life to the same mortgagees, to secure a sum of 4,000*l.*, and after the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy, it was held that the mortgagees had no right to set off the balance against the executor in respect of arrears of the annuity: *Re Gregson*, 36 C. D. 223. The doctrine established in the case of ordinary administrations in *Rees* v. *Watts, ubi supra*, does not apply in the case of an administration in bankruptcy: *Watkins* v. *Lindsay & Co.*, 67 L. J. Q. B. 362. The Judicature Act, by giving defendants a right to counterclaim, does not enable a defendant who has had notice of an administration suit to rely, in the shape of a counterclaim, on such set-off, since under the provisions of stat. 23 & 24 Vict. c. 38, s. 14, the Court of Chancery would have restrained an action in respect of it, and all proceedings by the defendant on the counterclaim would consequently be stayed by the Court of the Division of the High Court of Justice in which the action is brought: *Newell* v. *National and Provincial Bank of England*, 1 C. P. D. 496. See also *post*, p. 1582.

(*n*) *Wilkinson* v. *Cawood*, 3 Anstr. 905.

(*o*) 6 Q. B. 288.

(*p*) *Beckwith* v. *Bullen*, 8 E. & B. 683.

plaintiff personally where the latter is suing in a representative character (*q*).

Neither can a defendant set up by way of counterclaim against the claim of the plaintiff suing only in a distinct personal character claims against him personally and also as an executor (*r*), since Ord. XVIII. r. 5 (*s*) does not apply to a counterclaim (*t*).

Under J. A. 1873, sec. 24, the Court will give effect to equitable defences and grant relief on equitable grounds, and although the rule was as fully established in equity as at law, that demands due in different rights cannot be set off,—the principle being, that one man's money shall not be applied to pay another man's debts,—yet a Court of Equity would have regard to the beneficial ownership of the debts, and would give effect to the right of set-off accordingly, notwithstanding any technical difficulties as to forms of action or the like (*u*). In *Jones* v. *Mossop* (*x*), where A. was indebted on bond to B.: B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate: The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt: A. became surety for C. by joining in promissory notes: C. became an insolvent debtor, and A. was compelled to pay the notes: C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond; it was held, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt (*y*). But this case was decided on a clear admission by the defendant that the bond had become legally and equitably the property of C., that he had become the beneficial owner, and it was that beneficial

(*q*) *Stumore* v. *Campbell*, [1892] 1 Q. B. 314 (C. A.).

(*r*) *Macdonald* v. *Carington*, 4 C. P. D. 28.

(*s*) *Ante*, p. 1517.

(*t*) *Post*, p. 1571.

(*u*) *Jones* v. *Mossop*, 3 Hare, 568. See also *Baillie* v. *Edwards*, 2 H. L. C. 74.

(*x*) 3 Hare, 568.

(*y*) It must not, however, be understood that the mere existence of cross-demands was sufficient to constitute an equitable set-off as contradistinguished from the set-off at law. It will be found that this equitable set-off exists in cases where the party seeking the benefit of it could show some equitable grounds for being protected against his adversary's demand: *Rawson* v. *Samuel*, 1 Craig. & Ph. 161, 178.

ownership which had become vested in the assignee in his insolvency (*z*).

The only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of one man in the name of another, not when the result of taking the accounts would be to show that the ultimate balance would be his property. Therefore, where an executorship account was kept with bankers in the joint names of two executors, and one of the executors, who was residuary legatee under the Will, kept another account of his own with the bankers, and the bankers filed a liquidation petition, and at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn, it was held that the one account could not be set off against the other in the liquidation of the bankers (*a*).

In *Bailey* v. *Finch* (*b*), where a bank stopped payment and the trustee brought an action against a customer to recover the amount for which his account was overdrawn, the customer was allowed to set off a sum due to him on an account which he had opened as executor but to which as residuary legatee he was beneficially as well as legally entitled. But in this case there was a legal right of set-off because both the accounts were the accounts of one person and at law there was a right of set-off, and it was attempted to preclude that right by the fact that one of the accounts had been opened in the name of the customer as executor. There was a legal right to set-off, and the question was whether there was a sufficient equitable ground for preventing the legal right from taking effect.

In *Bridges* v. *Smyth* (*c*), the Court of Common Pleas held, that a judgment for the plaintiff in that Court might be set off against a judgment for the defendant in the King's Bench, although the plaintiff was dead and the judgment was assets in the hands of her administrator: In that case, Mrs. Bridges had judgment against Miss Smyth in the Common Pleas, in two actions, to the amount of 816*l.* 15*s.*; and Mrs. Bridges dying after the judgments were entered up, Frowd, her attorney, who claimed to be a judgment creditor, had taken out letters of administration: Miss Smyth had a judgment in the King's

(*z*) See *per* James, L. J., in *Ex parte Morier*, 12 C. D. 491, 497.

(*a*) *Ex parte Morier*, 12 C. D. 491.

(*b*) L. R. 7 Q. B. 34.

(*c*) 8 Bingh. 29.

Bench to the amount of 3,052*l.* against Mrs. Bridges, and Frowd was requested to set off the 816*l.* 15*s.* against the 3,052*l.*: This he refused to do, on the ground that, she being dead, and he being her administrator, the judgments in the Common Pleas were in a different right, and could not be set off without compromising the interest of the creditors: But the Court of Common Pleas ordered satisfaction to be entered on the judgment rolls in that Court, upon acknowledging satisfaction for 816*l.* 15*s.* on the judgment for 3,052*l.* in the King's Bench.

In answer to a set-off, the executor or administrator may give in evidence the advance of money by him *as executor* or administrator to the defendant (*d*).

defence of Statute of Limitations:

Where in *assumpsit* by an executor, in which all the promises were laid to be made *to the testator* in his lifetime, the defendant pleaded that he did not promise within six years next before the obtaining of the original writ of the plaintiff, and the plaintiff replied that the original was sued on such a day, and that within six years before the day of obtaining thereof, that is to say, on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication was held bad; because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the Will; for that gave no new cause of action, and therefore the time of proving the Will is perfectly immaterial (*e*).

But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the Statute of Limitations, and the plaintiff replied the special matter above-mentioned; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued

(*d*) *Gallant* v. *Bouteflower*, 3 Dougl. 34. See as to set-off generally, Ann. Prac. 1904, p. 281 *et seq.* See also *post*, p. 1582.

(*e*) *Hickman* v. *Walker*, Willes, 27; 2 Saund. 63, *k*, note to *Hodsden* v. *Harridge*.

to him (*f*). So where an action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of the letters, and not from the time when the bills became due, there being no cause of action until there is a party capable of suing (*g*).

It must be observed, that where, in *assumpsit* by an executor, on a contract made with *his testator*, all the promises in the declaration were laid to be made to the testator, and the defendant pleaded the Statute of Limitations, the plaintiff could not in his replication set forth a promise made to *himself* within six years, without being guilty of a departure, any more than he could in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the Statute of Limitations (*h*). Therefore, where it was necessary to rely on an acknowledgment, made since the death of the testator, to bar the statute, counts were required in the declaration laying promises to the plaintiff as executor (*i*).

Accordingly, if an executor brought an action on a bill or note, and intended to rely on an acknowledgment or promise made to himself in order to bar the statute, he had to state in his declaration the making of the bill or note, and must then have proceeded to aver that after the death of his testator or intestate, the defendant promised him (the plaintiff) as executor or administrator, to pay him. And where the declaration was so framed, such promise might have been denied by a plea of *non-assumpsit*, notwithstanding the rule of pleading, H. T. 1853, r. 7, that in all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* should be inadmissible: For the mere production and proof of the note would not prove the promise as made *to the executors*, as it would if the promise were laid as made *to the testator:* The right of action indeed is transferred to the executor, but no promise is implied by law to pay

(*f*) *Cary* v. *Stephenson*, 2 Salk. 421; 4 Mod. 372. See *Stanford's Case*, cited Cro. Jac. 61.

(*g*) *Murray* v. *E. I. Company*, 5 B. & A. 204. See also *ante*, p. 468; *Pratt* v. *Swaine*, 8 B. & C. 285; *Perry* v. *Jenkins*, 1 My. & Cr. 118.

(*h*) *Hickman* v. *Walker*, Willes, 29; *Dean* v. *Crane*, 1 Salk. 28. *Executors of the Duke of Marlborough* v. *Widmore*, 2 Stra. 890; 2 Saund. 63, *l*.

(*i*) As to what is sufficient evidence of an account stated with the plaintiff as executor, see *Purdon* v. *Purdon*, 10 M. & W. 562.

him; otherwise the Statute of Limitations would run from the death of the payee, and not from the time of the note becoming due: In order, therefore, to support the action, there must be an express promise to the executor, that is to say, an express promise as contradistinguished from a promise contained in the note itself, or anything implied out of it; and the cause of action is the existence of the note, *with* the express promise to the executor to pay the amount of it; whereas the rule is confined to cases where the action is *only* on the note (*k*): The effect of the plea of *non-assumpsit* was in such a case to admit that the bill or note was signed by the defendant, but to deny that he made any promise to the executor.

In *Clark* v. *Hooper* (*l*), payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute (*m*).

The statute is an answer to an action by an executor for a debt due to the testator for which he might have sued more than six years before the issue of the writ, although the action was commenced within a reasonable time after the death (*n*).

Writ by journeys accounts.

Where a plaintiff died, the obsolete writ by journeys accounts could not be brought by his executor (*o*).

(*k*) *Timmis* v. *Platt*, 2 M. & W. 720; *Gilbert* v. *Platt*, 5 Dowl. 748; *Rolleston* v. *Dixon*, 2 D. & L. 892.

(*l*) 10 Bing. 840.

(*m*) See, however, as to this case, the comments of Lord Herschell in *Stamford, &c. Banking Co.* v. *Smith*, [1892] 2 Q. B. at p. 769.

(*n*) *Penny* v. *Brice*, 18 C. B. N. S. 393. If, however, a creditor dies intestate on the day on which a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt becomes payable, the statute does not begin to run against the creditor's administrator until letters of administration have been taken out: *Atkinson* v. *Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377, 381, in which case there was no cause of action which the testator could have maintained.

(*o*) *Kinsey* v. *Heyward*, 1 Lord Raym. 432. If a writ abated without the default of the plaintiff, he might have had a new writ by journeys accounts, *i.e.*, *per dietas computatas*. The word *dieta* means a day's journey; and the origin of the expression is said to be that the Court of Chancery, being a movable Court, and following the King's Court, and the writs being to be purchased out of Chancery, the party was bound to apply to the King's Court as hastily as the distance of the place would allow, accounting twenty miles for every day's journey; and, for this reason, he was to show that he had pur-

Action by executor or administrator after expiry of six years.

However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the Statute of Limitations (21 Jac. I. c. 16) (which provides for the commencement of a new action within a year after the reversal by error of a judgment for the plaintiff, or after judgment against the plaintiff, or after reversal of the outlawry of the defendant), bring a new action (*p*); provided he does it recently, or within

chased it as hastily as possible, accounting the days' journeys he had to the Court: 1 Lord Raym. 433; Termes de la Ley, Art. Journies Account; Com. Dig. Abatement, P. There are some authorities for the proposition that the writ by journeys accounts is a continuance of the former writ. But Lord Coke calls it "*quodam modo*, a continuance." And Lord Lyndhurst, C., in *Davies* v. *Lowndes*, 1 Phil. 328; 6 M. & Gr. 529, and the Court of Common Pleas in a further stage of the same cause (7 M. & Gr. 762), expressed a very strong opinion that it is not a continuance, strictly and properly, of the old writ, but is a new writ.

(*p*) *Matthews* v. *Phillips*, 2 Salk. 425; *Kinsey* v. *Heyward*, 1 Lutw. 260; 12 Mod. 568. The remedy by fresh action would seem, from the case of *Swindell* v. *Bulkeley*, 18 Q. B. D. 250, to be still open to executors. In this case the defendant died before a writ which had been issued was actually served, and a fresh action against his executors within a year of probate was held to lie, though in the meantime the six years had expired. But by Ord. XVII. r. 1, it is provided that "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite;* and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death." By r. 2, "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice." And r. 4 of the same Order is as follows: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in

a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period (*q*). In *Kinsey* v. *Heyward* (*r*), a year is said to be a reasonable time; and the Court of King's Bench appears to have been of this opinion in *Wilcox* v. *Huggins* (*s*), where it is said, that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid: Indeed if the executor had been retarded by suits about the Will or administration, and had shown that in pleading, it would have been otherwise, because the neglect would then have been accounted for: And Lee, J., said, "I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the Court from the circumstances of the case; but generally, the year in the statute is a good direction." However, in *Lethbridge* v. *Chapman* (*t*), the action was allowed to be brought within fourteen months after the testator's death, though no reason was assigned for it. Upon the whole, therefore, it was deemed prudent for the executor to bring a new action as soon as he possibly could after the death of his testator, and at all events not to delay it beyond a year (*u*). But in *Curlewis* v. *Lord Mornington* (*x*), it was expressly held, that the executor was not bound to the year, if under the circumstances he could fairly be said to have used due diligence.

another capacity, an order that the proceedings should be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence." An executor or administrator so joined, even after judgment, becomes personally liable to all the costs *ab initio*: *Boynton* v. *Boynton*, 4 A. C. 733.

(*q*) 2 Saund. 64, *a*, note to *Hodsden* v. *Harridge*. And see *per* Lord Esher, M. R., in *Swindell* v. *Bulkeley*, 18 Q. B. D. at p. 254.

(*r*) 1 Lord Raym. 434.

(*s*) 2 Str. 207; Fitzg. 170, 289.

(*t*) 13 Vin. 103, *in margine*.

(*u*) 2 Saund. 64, *b*, note.

(*x*) 7 E. & B. 283; *S. C.*, in error, 27 L. J. Q. B. 439.

The form of the replication by an executor to a plea of the statute, where he brought a new action shortly after the death of a testator, was to state, that the testator on such a day sued out a writ of summons against the defendant, whereby he was commanded, &c. (and then continuing the writ down to the time of the testator's death); that he appointed the plaintiff as executor, and recently after his death, to wit, on such a day, &c., the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with an intent to implead him for the causes of action in the declaration specified, and upon his appearance to declare against him for the said several causes of action, and that he afterwards, on, &c., declared against the defendant, &c., with an averment that the several causes of action accrued within six years next before the suing out of the writ first above specified by the testator (*y*).

Again, if an executor brought *assumpsit*, but died before judgment and the six years run, his executor might, notwithstanding, bring a fresh action, so as he brought it in a reasonable time, which is to be decided at the discretion of the justices upon the circumstances of the case (*z*).

The principle of these cases, according to the judgment of Lord Chief Justice Treby, in the above-mentioned case of *Kinsey* v. *Heyward* (*a*), is, that when once the proviso in the Statute of Limitations is complied with by the commencement of an action within due time, the party is out of the purview of the Act, and set at liberty out of the restraint of the said statute. But the true ground of these decisions appears to be that they proceed upon the equity of the 4th section of the statute, and that the Courts have extended that section to the case of an executor whose testator has died pending an action brought by him; which, though not within the words of it, was evidently within the mischief (*b*). And the same equitable construction that has been applied, as above mentioned, to the 4th section of the statute of James, has been followed as to the

(*y*) 2 Saund. 64, *c*, note.

(*z*) Bull. N. P. 150, *a*.

(*a*) 1 Lord Raym. 434, *ante*, p. 1527.

(*b*) *Adam* v. *The Inhabitants of the City of Bristol*, 2 A. & E. 385, 403.

limitation of actions on debts for rent, covenants, bonds, &c., imposed by the stat. 3 & 4 Will. IV. c. 42, s. 3 (*c*).

Where the right of action accrued to the testator during his residence abroad, and he died abroad, never having returned to this country after the accrual thereof, the statute was held to be no bar to an action by his executors, although the right of action accrued more than six years before action brought; at all events if it be brought within six years after his death (*d*), the case being saved by the 7th section of the statute of James (which provides that if the person entitled shall be abroad at the time the cause of action accrued, such person may bring his action within six years of his return from beyond the seas), though not strictly within the words of it.

The 7th section of 21 Jac. I. c. 16, remains unrepealed, but the principle of the cases cited in the note, which were decided upon it, must, it would seem, be treated as no longer applicable, since by sect. 10 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), absence beyond seas or imprisonment is not to entitle a creditor to any time within which to commence an action with respect to which the period of limitation is fixed by (*inter alia*) sect. 3 of 21 Jac. I. c. 16, beyond the period fixed by such statute.

Denial of right of person in representative capacity.

By R. S. C. 1883, Ord. XXI. r. 5, it is provided that:—"If either party wishes to deny the right of any other party to claim as executor . . . . or in any representative or other alleged capacity . . . . he shall deny the same specifically."

Where the plaintiff claims in trespass or trover, on his *constructive* possession as executor or administrator, he should sue as executor or administrator (*e*).

But where the executor has been in *actual* possession of the property which was the subject of the suit, it would not be necessary for him to claim or give evidence of his title as executor or administrator, in an action against a wrongdoer (*f*).

What is sufficient proof of the plaintiff being executor, &c.:

It remains to consider, what shall be sufficient evidence of the plaintiff's title as executor or administrator, when it becomes necessary to prove it, either when the representative character of

(*c*) *Sturgis* v. *Darrell*, 4 H. & N. 622; *S. C.*, in error, 6 H. & N. 120.

(*d*) *Townsend* v. *Deacon*, 3 Exch. 706. See also *Forbes* v. *Smith*, 11 Exch. 161.

(*e*) *Ante*, p. 223.

(*f*) *Ante*, p. 223. But see also *Waller* v. *Drakeford*, 1 E. & B. 49.

the plaintiff is specifically denied, or in a suit on a cause of action arising in the plaintiff's own time.

probate:

Although the executor derives his title from the Will by which he is appointed, and not from the probate of the Will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of personal property (*g*) being vested in an executor, or of the executor's appointment (*h*). Therefore, the original Will cannot be read in evidence for that purpose, although produced by the officer of the Court of Probate or Probate Division, unless it bears the seal of the Court, or some other mark of authentication (*i*). The seal of the Court on the probate proves itself (*k*).

When probate is lost.

If the probate is lost, it was not the practice of the Ecclesiastical Court to grant a second, but only an exemplification from the records of the Court; which would be evidence of the proving the Will (*l*). And an examined copy of the probate is evidence of the person there named being executor; because the probate is an original, taken by authority, and of a public nature (*m*).

It must be observed, that all that is required, either in the case of an executor or administrator, is to show by legitimate evidence that the Court of Probate or Probate Division has given authority to the person to administer: It is only the act of the Court that is to be proved: The probate is only a copy of this act: The original book containing the entry of the act of the Court is the original, and therefore the primary evidence: Hence the Act-book, containing an entry of a Will having been proved, and of probate granted to the executors therein named, is admissible evidence of those persons being the executors, without accounting for the non-production of the probate (*n*).

(*g*) Sect. 1 (3) of the Land Transfer Act, 1897, now provides for the granting of probate and letters of administration in respect of real estate only, notwithstanding that there is no personal estate.

(*h*) *Ante*, p. 214; *Hamilton* v. *Aston*, 1 Carr. & Kirw. 679.

(*i*) *R.* v. *Barnes*, 1 Stark. N. P. C. 243; *Pinney* v. *Pinney*, 8 B. & C. 385. Nor is a copy of the Will evidence: Bull. N. P. 246.

(*k*) Court of Probate Act, 20 & 21 Vict. c. 77, s. 22. See also S. P. before the Act passed, *Kempton* v. *Cross*, Cas. temp. Hardw. 108.

(*l*) *Shepherd* v. *Shorthose*, 1 Stra. 412; Bull. N. P. 246.

(*m*) *Hoe* v. *Nelthorpe*, 3 Salk. 154; S. P. by Holt, C. J., in *R.* v. *Haines*, Skinn. 584; Bull. N. P. 246.

(*n*) *Cox* v. *Allingham*, Jacob. 514.

And now, since it is provided by R. S. C. 1883, Order XXXVII. r. 4, that office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible, it would seem that an office copy of the record from the Probate Registry is good evidence of the executor's or administrator's title.

Proof of revocation of probate.

To prove that the probate of a Will had been revoked, an entry of the revocation in a book of the Prerogative Court, in which all causes were entered by the Registrar, and which was kept as the only record of such proceedings, and of the decree of the Court, was admitted to be good evidence (*o*).

The title of several plaintiffs, claiming as executors, is well evidenced by probate, granted to one only, of the Will appointing them all (*p*): And the rule was the same whether they sued in their representative character or not (*q*); for probate granted to one of several executors enures to the benefit of all (*r*).

The title of an administrator *de bonis non* is sufficiently proved by the letters of administration *de bonis non*, without those granted to the first executor or administrator (*s*).

Where an executor or administrator produces the probate or letters in proof of his representative character, and his case shows that he sues for a greater value than is covered by the probate or administration stamp, he cannot recover (*t*).

Proof of letters of administration:

The title of the plaintiff, as administrator, may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the Court of Probate (*u*), or Probate Division, or, without producing the letters of administration, by the original book of acts, directing the grant of the letters (*x*); or by a copy of it under R. S. C. 1883, Order

(*o*) *Ramsbottom's Case*, 1 Leach, Cr. C. 60, note (*c*). And see R. S. C. 1883, Ord. XXXVII. r. 4, *supra*.

(*p*) *Walters* v. *Pfeil*, 1 Mood. & Malk. 362; *Scott* v. *Briant*, 6 Nev. & M. 381.

(*q*) Mood. & Malk. 362.

(*r*) *Ante*, p. 295; *Watkins* v. *Brent*, 7 Sim. 512; *Cummins* v. *Cummins*, 3 J. & Lat. 64.

(*s*) *Catherwood* v. *Chabaud*, 1 B. & C. 150. See also *Gradell* v. *Tyson*, 2 Stra. 716.

(*t*) *Hunt* v. *Stevens*, 3 Taunt. 113; *Carr* v. *Roberts*, 2 B. & Ad. 905. See *post*, pp. 1590, 1591, as to the amount of stamp being admissible evidence of assets.

(*u*) *Kempton* v. *Cross*, Cas. temp. Hardw. 108.

(*x*) *Ibid.*; *Elden* v. *Keddell*, 8 East, 187; *Ramsbottom* v. *Buckhurst*, 2 M. & S. 567.

XXXVII. r. 4. The original book of acts, directing letters of administration to be granted, with the Surrogate's *fiat* for the same, was held to be evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another), if the first are not recalled; for the original book was the authority for the proper officer to make out letters of administration, and the letters of administration were only the copy of the original minutes of the Court, drawn up in a more formal manner (*y*). So an examined copy of the Act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce his letters of administration (*z*).

There has already been occasion to consider how far a probate or letters of administration, when produced by the plaintiff, are conclusive upon the defendant (*a*). But it may be convenient, in this place, to recapitulate some of the points established on this subject.

Evidence for defendant.

The defendant cannot prove that another person was appointed executor or administrator, or that the testator was insane, or that the Will, of which probate had been granted, was forged: for that would be directly contrary to the seal of the Probate Division in a matter within its immediate jurisdiction (*b*).

But it may be proved that the supposed testator or intestate is alive; for in such case, the Probate Division can have no jurisdiction (*c*). And it may be shown, that the seal attached to the supposed probate has been forged, or that the letters have been revoked (*d*).

Again, the defendant may plead in his defence, that he has paid the debt, which is the subject of the action, to an executor who had obtained probate of a forged Will, unrepealed at the time of the payment (*e*). But payment of money under the probate of a supposed Will of a living person would be void; because, in such case, the Probate Division has no jurisdiction, and the probate can have no effect (*f*).

(*y*) *Elden* v. *Keddell*, 8 East, 187; *Garrett* v. *Lister*, 1 Lev. 25.

(*z*) *Davis* v. *Williams*, 13 East, 232.

(*a*) *Ante*, p. 431 *et seq.*

(*b*) *Ante*, p. 432.

(*c*) *Ante*, p. 441.

(*d*) *Ante*, p. 441.

(*e*) *Ante*, p. 433; *Allen* v. *Dundas*, 3 T. R. 125.

(*f*) *Ibid.* 130.

It may be doubted whether admissions made by an executor or administrator, before he was clothed with that character, are receivable in evidence against him in an action brought by or against him in his representative capacity (*g*). However, in *Smith* v. *Morgan* (*h*), Tindal, C. J., admitted the declaration of the assignees of a bankrupt made by them before their appointment, stating that he was not aware of any distinction between the admissions of parties suing in a representative character and in their own right (*i*).

Whether admissions made by an executor, &c., before appointment are receivable against him as executor:

The admission of one of several executors or administrators will not bind the others; at all events, unless it is made in the character of executor. Therefore, where two executors were sued as such on a covenant of their testator for quiet enjoyment, and the question was whether the defendants who had evicted the plaintiff had done so under lawful title, it was held that an admission of *one* of the defendants was no evidence of such title (*k*).

Admissions by co-executor.

An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. IV. c. 14) made by one of several executors as executor binds the estate, and on his death an order may be made in an administration action for payment of the debt out of the assets remaining unadministered in the hands or under the control of the surviving executors (*l*).

But it was held by Stirling, J., in *Astbury* v. *Astbury* (*m*), that an acknowledgment by one of two executors and devisees in trust for sale of real estate against the wishes of the other, that more than six years' interest was due on a mortgage created by the testator was not to be treated as the valid act of the two in their capacity of trustees, and was not a good acknowledgment within sect. 42 of the Real Property Limitation Act, 1833.

Executors and administrators instituting or defending actions are subject to the same rules as to costs, as they would be if they were suing or defending in their own right (*n*). The

Costs.

(*g*) See *Stewart* v. *Edmonds*, *ante*, p. 317, note (*d*).

(*h*) 2 M. & Rob. 257.

(*i*) See *contra*, *Fenwick* v. *Thornton*, M. & M. 51, *coram* Lord Tenterden.

(*k*) *Fox* v. *Waters*, 12 A. & E. 43. See also *Scholey* v. *Walton*, 12 M. & W. 510.

(*l*) *Re Macdonald*, [1897] 2 Ch. 181. And see *post*, p. 1575 *et seq.*, where the effect of sect. 1 of Lord Tenterden's Act will be found discussed.

(*m*) [1898] 2 Ch. 111.

(*n*) 2 Dan. C. P., 7th edit., 960.

awarding of costs in the Supreme Court is governed by R. S. C. 1883, Ord. LXV. r. 1 (*o*).

Plaintiffs who live out of the jurisdiction of the Court may be compelled to give security for costs, though such plaintiffs sue as executors (*p*).

Remedy on judgment obtained by testator.

By Ord. XLII. r. 23, it is provided: "In the following cases viz., (a) where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution . . . . the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly." This seems to be the proper procedure in cases where the executor seeks to issue execution upon a judgment obtained by the testator (*q*).

Until the executor or administrator had made himself a party to the judgment, he was not entitled, under the 61st section of the Common Law Procedure Act, 1854 (*r*), to attach a debt due to the judgment debtor (*s*). Whether under the Judicature Act he would be entitled to proceed under Ord. XLII. r. 23, or whether he would have to make himself a party under Ord. XVII. r. 4, would seem to depend on whether the judgment of Lord Coleridge, C. J., or that of Stephen, J., in *Fellows* v. *Thornton* (*t*) is right. Where a trustee in bankruptcy of a judgment creditor desires to issue execution under

(*o*) Discussed, *ante*, p. 285. See also *post*, p. 1552.

(*p*) *Chevalier* v. *Finnis*, 1 Brod. & Bingh. 277; *Chamberlain* v. *Chamberlain*, 1 Dowl. 366; *Knight* v. *De Blaquière*, Sau. & Sc. 658. In an action by two executors, one of whom is out of the jurisdiction and the other insolvent, the defendant is not entitled to a stay of proceedings until they give security for costs: *Sykes* v. *Sykes*, L. R. 4 C. P. 645.

(*q*) See *ante*, p. 678. *Re Shephard*, 43 C. D. 131. If the writ of execution was issued in the testator's lifetime, it might have been executed after his death: *Ellis* v. *Griffith*, 16 M. & W. 106. The executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under Ord. XLII. r. 23, to issue execution on the judgment. Under sub-sect. 1 (g) of sect. 4 of 46 & 47 Vict. c. 52, Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment: *Ex parte Woodall*, 13 Q. B. D. 479, 53 & 54 Vict. c. 71, s. 1, Bankruptcy Act, 1890.

(*r*) 17 & 18 Vict. c. 125.

(*s*) *Holmes* v. *Tutton*, 5 E. & B. 65.

(*t*) 14 Q. B. D. 335. See also *ante*, p. 666, note (*m*).

Ord. XLII. r. 23, he must first be made a party under Ord. XVII. r. 4 (*u*).

Relief by *auditâ querelâ* now abolished.

If an executor or administrator obtained judgment, and then the probate or letters of administration were revoked, the regular mode for the defendant to obtain relief was by an *auditâ querelâ* (*x*); but now, by Ord. XLII. r. 27, it is provided that "no proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just."

County Court Act, 1888.

By stat. 51 and 52 Vict. c. 43, s. 95, "it shall be lawful for any executor or administrator to sue and be sued in the County Court in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in the High Court."

Presentment of bill of exchange by executor.

If the holder of a bill be dead, and the executor has not yet proved the Will, it is said that the bill must, nevertheless, be presented for payment at the regular time: but it would seem that the drawer and indorsers would not be discharged, provided presentment be made, and notice given of the dishonour, by the executor or administrator, in a reasonable time (*y*).

(*u*) *Re Clements*, [1901] 1 Q. B. 260.

(*x*) *Turner* v. *Davies*, 2 Saund. 148.

(*y*) See Roscoe on Bills, 147. Mr. Justice Byles, in his book on Bills, 16th edit., Chap. V., p. 63, says: "If the holder be dead, and the executor have not proved the Will, still it seems that the executor is bound to present the bill when presentable, for his title to his testator's property is derived exclusively from the Will, and vests in him from the moment of the testator's death. But as the title of an administrator is derived wholly from the Court of Probate, and he has none till the letters of administration are granted, he probably would be excused by impossibility." The Bills of Exchange Act, 1882, does not directly deal with the matter, but sect. 46 provides that "delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

CHAPTER THE SECOND.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS IN EQUITY.

General equitable rights of executor, &c.

THE executor or administrator is entitled to all equitable rights and interests of the deceased and can enforce them in the same way as the deceased.

Exception.

The one exception to this rule, which is founded on the maxim *actio personalis moritur cum personâ* (*a*), has but little application in equity: for instance, it does not prevent the executor of a person wronged from obtaining an equitable remedy by a mandatory injunction, in order to prevent the continuance of some injury to the property of a deceased person. An executor can sustain an action to have an obstruction to light removed if it affects land of his testator, although his right to damages for the injury to the real estate of the deceased may be barred, because the action was not brought within the limit of time provided by 3 & 4 Will. IV. c. 42, s. 2 (*b*), and where injury to the dead man's estate is shown the remedy is not confined to injunction, but extends to damages also (*c*).

Many rights the executor enforces in the same way as the deceased would have done.

A great many of the equitable rights and interests of the deceased the executor or administrator can enforce in the Chancery Division by precisely the same form of action as the deceased would employ if he was living.

For instance, an action in equity can be successfully maintained to protect the literary property of the deceased, as in *Thompson* v. *Stanhope* (*d*), where the executors of Lord

(*a*) This maxim will be found fully treated of, *ante*, p. 606; and see *Phillips* v. *Homfray*, 24 C. D. 439; *Re Duncan*, [1899] 1 Ch. 387.

(*b*) *Jones* v. *Simes*, 43 Ch. D. 607.

(*c*) For instances of protecting trade-marks, see *Hatchard* v. *Mège*, 18 Q. B. D. 771; *Oakley* v. *Dalton*, 35 Ch. D. 700.

(*d*) Ambl. 734. See also *Granard* v. *Dunkin*, 1 Ball & B. 207.

Chesterfield obtained an injunction against Mrs. Stanhope, restraining her from publishing the letters which had been received by her husband, the natural son of Lord Chesterfield; or *Queensberry* v. *Shebbeare* (*e*), where the representatives of Lord Clarendon obtained an injunction to restrain the printing of an unpublished copy of his *History of the Rebellion*, which had been given by a former representative of the author to a person under whom the defendant claimed, but not with an intention that he should publish it.

Scope of this chapter.

It is not proposed in this chapter to discuss such remedies as are before mentioned; they are common to all litigants in the Chancery Division, and they do not become exceptional merely because they are adopted by executors or administrators.

In this chapter and in the chapter on remedies against an executor in equity it is only proposed to discuss those remedies by or against the executor or administrator which are peculiar and exceptional.

Retainer and set-off not exceptional remedies.

In the exceptional remedies by and against executors and administrators in equity hereinafter mentioned, questions of retainer and set-off by the executor or administrator frequently arise, but retainer and set-off are legal or statutory rather than equitable remedies, and are fully dealt with in other parts of this Work (*f*).

Right of executor, &c., to pay statute-barred debt.

An executor or administrator, can before an administration order, pay or retain a statute-barred debt (*g*), or may admit it so as to take it out of the statute (*h*), but he cannot revive it after decree (*i*). And the Court will not order a fund to be paid out to an executor or administrator who has the legal title to a statute-barred debt merely to enable him thereby to acquire a right of retainer (*k*).

Statute of Limitations.

The Statute of Limitations may be set up in resistance to an application to continue the proceedings, if the executor or administrator does not proceed within six years after the abatement of an action, provided there has been no judgment; for the Statute of Limitations cannot be applied to a judgment (*l*).

(*e*) 2 Eden, 329.

(*f*) *Ante*, p. 785 and p. 1519.

(*g*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 K. & J. 166.

(*h*) *Moodie* v. *Bannister*, 4 Drew. 432; *Blair* v. *Nugent*, 3 J. & Lat. 673.

(*i*) *Phillips* v. *Phillips*, 32 Beav. 26.

(*k*) *Per* Stirling, J., in *Trevor* v. *Hutchings*, [1896] 1 Ch. 844.

(*l*) *Hollingshead's Case*, 1 P. Wms. 742; Mitf. Pl. 272, 273, 4th edit.

If an executor or administrator, trustee for an infant, neglects to sue within six years, the Statute of Limitations binds the infant (*m*).

In the case of an administrator time runs from the death, not from grant of letters of administration.

An administrator claiming the estate or interest in lands of the deceased person of whose chattels he has been appointed administrator, is to be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration (*n*). The effect of this is, that time for the purpose of the Statute of Limitations commences to run, as against an administrator claiming a chattel interest in land, from the date of the death of the intestate and not from the date of the grant of administration (*o*). And since the passing of the Land Transfer Act, 1897, the same rule would seem to apply as against an administrator claiming a freehold interest in land vested in him under that Act.

Restraining proceedings in foreign Courts by injunction.

The Chancery Division has power to restrain proceedings in a foreign Court against an executor or administrator by persons within the jurisdiction (*p*) by the exercise of jurisdiction *in personam* against such persons. It will do so where proceedings are improperly or vexatiously instituted or prosecuted in the foreign Court to determine questions which ought to be adjudicated upon in this country (*q*).

This jurisdiction can be exercised whether an administration order has or has not been made (*r*).

Proceedings in a foreign Court will not be restrained on the ground of mere hardship or inconvenience (*s*).

Stay of proceedings after administration order.

The staying of actions against an executor or administrator, after an administration order has been made, will be found dealt with in a subsequent chapter (*t*).

(*m*) *Wych* v. *East India Company*, 3 P. Wms. 309.

(*n*) 3 & 4 Will. IV. c. 27, s. 6.

(*o*) *Re Williams*, 34 Ch. D. 558; *Re Bonsor and Smith's Contract*, 34 Ch. D. 560, note.

(*p*) The Court has no such jurisdiction if the persons sought to be restrained are not within the jurisdiction: *Re Boyse*, 15 Ch. D. 591.

(*q*) *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 416; *Lord Portarlington* v. *Soulby*, 3 M. & K. 104; *Venning* v. *Lloyd*, 1 D. F. & J. 193; *McHenry* v. *Lewis*, 22 Ch. D. 397; *Hyam* v. *Helm*, 24 Ch. D. 531.

(*r*) *Bushby* v. *Munday*, 5 Madd. 297; *Baillie* v. *Baillie*, L. R. 5 Eq. 175; *Bunbury* v. *Bunbury*, 1 Beav. 336; *Cord* v. *Cord*, 33 Beav. 314.

(*s*) *Fletcher* v. *Rodgers*, 27 W. R. 96. Although judgment has been given in the foreign Court.

(*t*) See *post*, p. 1642 *et seq.*

Where the executor, in an action at law against him by a creditor of the deceased, had pleaded according to the truth of the case, he was always held entitled, when the assets were taken from him and administered by the Court of Equity, to all the protection which that Court could give him against any personal liability in respect of the judgment at law (*u*).

But with respect to restraining a creditor from proceeding, after a decree for administration, upon a verdict or judgment recovered by him against an executor or administrator, the following distinction was taken by Lord Eldon, in *Brook* v. *Skinner* (*x*): That if the plaintiff at law had recovered judgment *de bonis testatoris*, the Court would restrain the creditor from taking execution on such judgment; and that if he had recovered *de bonis propriis*, the Court would not restrain the execution. So, in *Clarke* v. *Ormonde* (*y*), his Lordship said, that if a creditor has obtained judgment by which the executor is personally liable, *de bonis propriis*, the Court had nothing to do with it; but if a judgment *de bonis testatoris*, it certainly would be a case for an injunction. That is, that the Court would interfere to protect the assets, but not to protect the executor against any liability to which he might have personally subjected himself. And, in *Drewry* v. *Thacker* (*z*), his Lordship intimated his opinion, that there was no instance in the history of the Court of Chancery, where, after a judgment at law *de bonis testatoris, et si non, de bonis propriis* of an executor, and execution issued, the proceedings at law had been restrained, on a decree subsequently obtained for administration of the assets. But, in *Lord* v. *Wormleighton* (*a*), the executor pleaded, to an action by a creditor, *non assumpsit*, a set-off, and *plene administravit*, and the verdict was against him on all these pleas: And, on a decree for the administration of the estate having been pronounced pending the action, Lord Eldon granted an injunction against the creditor, with a direction that the executor should pay the costs at law, including the costs of the trial: And his Lordship observed, that the case had been argued as if it was the case of a judgment *de bonis testatoris, et si non, de bonis propriis:* but that, in fact, it was a judgment for the

(*u*) *Gaunt* v. *Taylor*, 2 Hare, 413.

(*x*) 5 Meriv. 481, note.

(*y*) Jacob, 124.

(*z*) 3 Swanst. 542, 543, 547, 548. See also *Terrewest* v. *Featherby*, 2 Mer. 480.

(*a*) Jacob, 148.

damages *de bonis testatoris*, and for the costs only *de bonis propriis*.

In the modern case of *Etheridge* v. *Wormsley* (*b*), a creditor had previously to any administration decree, obtained judgment in a County Court against the defendant, a sole executrix. Pearson, J., refused to restrain the creditor from pursuing his remedy in the County Court against the executrix personally, but ordered payment to the creditor by the receiver of the estate, without prejudice to the question whether the executrix should be allowed the payment.

One executor or administrator can in equity bring an action against another (*c*).

Right of executor or administrator to sue before probate or letters of administration.

An executor or administrator (*d*) can in equity as at law sue before grant to him of probate, or letters of administration, but he must obtain a grant of probate or letters of administration before the hearing (*e*). In the same way an executor of a creditor of a company can present a winding-up petition before obtaining probate. And it would seem to be unnecessary for an executor to allege in his pleading that a valid grant of probate has been made to him (*f*).

Evidence of death of testator.

In an old case (*g*), it was held that production by a plaintiff, suing as administrator to A., of the letters of administration, was not *primâ facie* evidence of A.'s death (*h*), but at the hearing, liberty was given to the plaintiff to exhibit interrogatories to prove the death, and the cause permitted to stand over for that purpose (*i*).

Right of executor or

An action commenced by the dead man can be continued by

(*b*) 29 Ch. D. 557.

(*c*) *Allen* v. *Story*, Toth. 150; *Peake* v. *Ledger*, 8 Hare, 313. See the American case of *Beall* v. *Hilliary*, 1 Maryland, 186; 54 American Decisions, 649.

(*d*) *Humphreys* v. *Humphreys*, 3 P. Wms. 350.

(*e*) See *ante*, pp. 225, 226.

(*f*) *Re Masonic and General Life Assurance Co.*, 32 Ch. D. 373, *ante*, p. 226. The old practice was to allege that probate had been granted or letters of administration taken out: *Humphreys* v. *Ingledon*, 1 P. Wms. 753, *ante*, p. 225.

(*g*) *Moons* v. *De Bernales*, 1 Russ. Chanc. Cas. 301.

(*h*) See *ante*, p. 440.

(*i*) See *Hood* v. *Pimm*, 4 Sim. 101. Where money was ordered to be paid to A. or his representatives, the mere production of the probate was not formerly sufficient to enable the representative to obtain payment; proof of the death was required, and that the testator was the party in the cause: *Clayton* v. *Gresham*, 10 Ves. 289. Now, however, it appears that the production of the probate is sufficient: Dan. Ch. Pr. 7th edit. 637.

his executor or administrator, if the interest survives, on obtaining an order for that purpose (*k*).

administrator to continue an action.

An action commenced by co-executors does not abate by the death of one of them, as the whole of his interest survives to the others, nor is any order to continue the proceedings necessary (*l*).

Effect of death of one of several plaintiff co-executors.

Where there are several executors, they should all sue, though one of them is an infant (*m*). If only one of several executors has proved, he may sue alone without making the other executors parties, although they may not have renounced (*n*), unless they have acted (*o*). Where one of two or more executors refuses to join as a plaintiff, the other or others can still bring the action, making the executor who refuses to join a defendant (*p*).

Parties to an action by executors.

Any executor, administrator or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate or the execution of the trusts (*q*).

An executor or administrator is not allowed to sue or defend as a pauper, "because the indulgence intended poor persons not of ability to sue for their rights *in formâ pauperis* only extends to persons suing in their own rights, and not as executor or administrator" (*r*).

Executor cannot sue or defend *in formâ pauperis.*

The ordinary method of invoking the aid of the Chancery Division is by writ of summons; in some cases a special mode of procedure by originating summons, motion, or petition applies, but in all cases to which such special procedure does not apply, proceedings can only be commenced by writ. An originating summons is by far the most important form of special procedure. It is only in cases specially defined by statute or the Rules of Court that the Court can exercise jurisdiction on an application by originating summons (*s*).

Writ or originating summons.

(*k*) R. S. C. 1883, Ord. XVII.

(*l*) Toller, 497.

(*m*) 16 Vin. Abr. 251, tit. Parties (B.), pl. 20.

(*n*) *Davies* v. *Williams*, 1 Sim. 5; Dan. Ch. Pr. 7th edit. 203, 204; and see *ante*, p. 726.

(*o*) *Vickers* v. *Bell*, 4 De G. J. & S. 274; and see *ante*, p. 1515.

(*p*) See Ord. XVI. r. 11; and cf. *Luke* v. *South Kensington Hotel*, 11 C. D. 121. See also Ord. LV. r. 5 (h).

(*q*) Ord. XVI. r. 38. See also Ord. XVI. rr. 8, 9, 32, 40, 46, and Ord. LV. r. 3.

(*r*) *Paradice* v. *Sheppard*, 1 Dick. 136; Beames on Costs, 78; *Oldfield* v. *Cobbett*, 1 Phil. Ch. C. 613; *Fowler* v. *Davies*, 16 Sim. 182. See *Bayly* v. *Bayly*, 11 Beav. 256.

(*s*) For other methods for obtain-

Difference between proceedings commenced by writ and originating summons.

The chief difference between proceedings commenced by writ and originating summons is, that the proceedings in the former case are in Court, and there are usually pleadings delivered by the parties; in the latter case the proceedings are in chambers, without pleadings.

Costs of proceedings wrongly commenced.

In all cases where proceedings can be commenced by originating summons they can also be commenced by writ of summons; but if proceedings are commenced by writ of summons, which ought to be commenced by originating summons, the extra costs incurred are usually thrown upon the plaintiff (*t*).

Why a summons is preferable in case of doubt.

If there be any real doubt as to whether proceedings should be commenced by originating summons or by writ, the preference should be given to originating summons, as, should the procedure ultimately turn out to be wrong, the Court will usually give the executor or administrator issuing the summons his costs out of the estate, where a mistake has *bonâ fide* been made. Where an originating summons had, in the first instance, been taken out and dismissed on the ground of want of jurisdiction, North, J., on a subsequent application by petition to deal with the same fund, allowed the costs of the summons, because it had been issued in the reasonable expectation that the order could be made in chambers, and it was a meritorious application (*u*).

Matters of special difficulty.

The difficulty or importance of the question involved is no reason for refusing to deal with it on originating summons, but in matters of special difficulty, or where questions of large amount are involved, the Court usually looks with indulgence on proceedings commenced by writ (*x*).

ing the advice and direction of the Court, see *post*, p. 1560.

(*t*) In many cases the costs of proceeding by writ are actually less than the costs of proceeding by summons would have been. As many orders can only be made by the Judge personally (see Ord. LV. rr. 15 and 15A), and as most important matters are adjourned to him, both time and expense can often be saved by proceeding by writ, and the Judge can, and will, upon application by motion, and with the consent of the parties, at once make the order required.

(*u*) *Re Jellard's Trusts*, W. N. (1888), p. 42. The Judge usually allows the costs where there is room for doubt as to the jurisdiction on summons, and a mistake has been made *bonâ fide*.

(*x*) See hereon *Bond* v. *Walford*, 54 L. T. N. S. 672.

In an administration action the writ and pleadings must be entitled, "In the matter of the estate of A. B., deceased, Between," &c. (*y*). An originating summons for the determination of a question arising in the administration of an estate must be entitled in the same way (*z*).

Heading of writ, &c., in an administration action.

Or administration summons.

The Court can make an order for general administration of the personal and real estate of a deceased person on originating summons (*a*).

The rules giving special remedies to executors and administrators by originating summons are rules 3, 4 and 4a of Ord. LV. of the Rules of the Supreme Court.

Rule 3 of Ord. LV. is as follows: "The executors or administrators of a deceased person, or any of them, and any person claiming to be interested in the relief sought as a creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case require, (that is to say) the determination, without an administration of the estate or trust, of any of the following questions or matters:—

Questions which can be determined on originating summons.

"(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust;

"(b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;

"(c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;

"(d) The payment into Court of any money in the hands of the executors or administrators or trustees (*b*);

(*y*) Annual Practice, 1904, p. 1083.

(*z*) See Table of Titles of originating summonses and petitions issued out of the Central Office, and R. S. C. Aug. 1894, Ord. LIV. r. 46, and App. K. Form 1A.

(*a*) R. S. C. 1883, Ord. LV. r. 4, *post*, p. 1544. An order cannot be made to serve an originating summons out of the jurisdiction: *Re Busfield*, 32 C. D. 123.

(*b*) It appears that only money actually in the hands of executors, administrators, or trustees will be ordered to be paid into Court under this rule. See *post*, p. 1616.

"(e) Directing the executors or administrators or trustees to do, or abstain from doing, any particular act in their character as such executors or administrators or trustees (*c*);

"(f) The approval of any sale, purchase, compromise, or other transaction (*d*);

"(g) The determination of any question arising in the administration of the estate or trust (*e*)."

Administration on originating summons.

Under rule 4 of Ord. LV. "Any of the persons named in the last preceding rule may, in like manner, apply for and obtain an order for—

"(a) The administration of the personal estate of the deceased:

"(b) The administration of the real estate of the deceased:

"(c) The administration of the trust."

Under rule 4a of Ord. LV. (R. S. C. Oct. 1899), "If for the purposes of the Land Transfer Act, 1897, it is desirable to ascertain the heir-at-law or any devisee or legatee of the person who has died, having real estate vested in him within the meaning of that Act, the same may be ascertained and all necessary directions with regard to carrying out the provisions of that Act may be given on any originating summons taken out under rules 3 and 4 of this Order."

Under rule 5 of Ord. LV. "The persons to be served with the summons under the last two preceding rules (*f*) in the first instance shall be the following; (that is to say)—

(*c*) The act must be something within their trust: *Suffolk* v. *Lawrence*, 32 W. R. 899.

(*d*) The Court cannot order a sale under this rule. It can only approve one as to which the trustees have a discretion. The Court has, however, power to order a sale where necessary or expedient for the purposes of the action before it, under Ord. LI. r. 1: *Re Robinson*, 31 C. D. 247. See on this rule *Re Household*, 27 C. D. 553, where trustees were authorized to advance to the tenant for life part of the personal estate for the purpose of stocking and cultivating a farm forming part of the settled real estate.

(*e*) Under this rule only those questions can be determined which before the existence of the rule could have been determined under a judgment for the administration of an estate or the execution of a trust: *Re William Davies*, 38 C. D. 210. This subject will be found further treated of in the subsequent chapter dealing with the remedies against executors and administrators in equity.

(*f*) Rr. 3 and 4 of Ord. LV.

"A. Where the summons is taken out by an executor or administrator or trustee;

"(a) For the determination of any question, under sub-sections (a) (e) (f) or (g) of rule 3, the persons, or one of the persons, whose rights or interests are sought to be affected:

"(b) For the determination of any question, under sub-section (b) of rule 3, any member, or alleged member of the class:

"(c) For the determination of any question, under sub-section (c) of rule 3, any person interested in taking such accounts:

"(d) For the determination of any question, under sub-section (d) of rule 3, any person interested in such money:

"(e) For relief under sub-section (a) of rule 4, the residuary legatees, or next of kin, or some of them:

"(f) For relief under sub-section (b) of rule 4, the residuary devisees, or heirs, or some of them:

"(g) For relief under sub-section (c) of rule 4, the *cestuis que trust* or some of them:

"(h) If there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur:

"B. Where the summons is taken out by any person other than the executors, administrators or trustees, the said executors, administrators or trustees."

Ord. XVI. contains the following rules relating to procedure in administration proceedings:—

Trustees, executors, &c. may sue and be sued as representing estate.

Rule 8. "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previous existing parties (*g*).

Power to approve compromise in absence of some of the persons interested.

9.—(a). "Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties in the proceedings, but there are other persons in the same interest before the Court and assenting

(*g*) See *post*, p. 1654.

to the compromise, the Court or Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts (*h*).

Power to appoint person to represent heir, next of kin, class, to determine question of construction:

32.—(a). "In any case in which the right of an heir-at-law, customary heir, or the next of kin or a class, shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law, customary heir, or next of kin or class, and the Court or Judge shall consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before such heir-at-law, customary heir, next of kin, or class, shall have been ascertained by means of enquiry or otherwise, the Court or Judge may appoint some one or more persons to represent such heir-at-law, customary heir, next of kin, or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, customary heir, next of kin or class so represented.

Power to appoint person to represent heir, next of kin, class, in other cases.

(b). "In any other case in which an heir-at-law, or customary heir, or any next of kin or a class shall be interested in any proceedings, the Court or Judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next of kin or class, and the judgment or order of the Court or Judge in the presence of the persons so appointed shall be binding upon the persons so represented (*i*).

Any residuary legatee or next of kin may obtain order for administration without serving other beneficiaries:

33. "Any residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person, may have the same without serving the remaining residuary legatees or next of kin.

So legatee interested in

34. "Any legatee interested in a legacy charged on real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or

(*h*) See Ord. XVI. r. 9, *post*, p. 1653, as to one or more persons suing and being sued on behalf of all persons having the same interest.

(*i*) See also *post*, p. 1654.

order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

proceeds of realty:

35. "Any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir.

So residuary devisee or heir:

38. "Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

So executor, administrator, or trustee may obtain order for administration against any one beneficiary.

39. "The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Judge may require any person to be made a party and may give conduct of action to any person.

40. "Wherever, in any action for the administration of the estate of a deceased person or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made—

Notice of judgment to be served on certain persons:

"(a) Under Order XV.;

"(b) Under Order XXXIII.;

"(c) Affecting the rights or interests of persons not parties to the action;

the Court or Judge may direct that any persons interested in the estate or under the trust or in the hereditaments, shall be served with notice of the judgment or order; and after such notice such persons shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or Judge to discharge, vary, or add to the judgment or order.

effect of service.

41. "It shall not be necessary for any person served with notice of any judgment or order to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a defendant entering an appearance.

Order for liberty to attend not necessary;

appearance to be entered.

46. "If in any cause or matter, or other proceeding, it shall

Where no

legal personal representative, Court may proceed in the absence, or appoint some person to represent the estate.

appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, and may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons (if any) as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding (*k*).

Appearance at chambers in respect of creditor's claims.

47. "In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Court or a Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The Court or a Judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit."

Under rule 6 of Ord. LV., "The Court or a Judge may direct such other persons to be served with the summons as they or he may think fit."

Application in chambers as to parties to be served.

In a case where it was necessary to determine on the construction of a Will whether the members of a class took *per capita* or *per stirpes*, but where, as the members of the class were known, the Court could not appoint the persons before it to represent the class under Ord. XVI. r. 32, it was held that the proper course to adopt was to serve the executors first, and then apply in chambers, to have it ascertained who were the parties interested, and who ought to be served (*l*).

Advantage to an executor of having questions decided by the Court.

The above rules give an executor or administrator a cheap and speedy method of getting the assistance and directions of the Court, and he is of course protected where he acts under an order so obtained. In all cases to which the rules apply, the executor or administrator, where there is any doubt or difficulty, should issue an originating summons and have the matter

(*k*) As to r. 46, see *post*, p. 1612. (*l*) *Re Gardiner*, W. N. (1887), p. 59.

decided by the Court, and not rely on the advice of a solicitor or opinion of counsel, which, according to the circumstances, may, or may not, afford him some indemnity. The tendency of the Court seems rather to encourage than to discourage applications by executors or administrators under this rule (*m*).

Questions of construction of Wills.

An application should, for instance, always be made to the Court for its directions under these rules where there is difficulty in construing the Will; as an executor or administrator who, although acting *bonâ fide*, distributes the estate on what turns out to be an erroneous construction, is liable to make good the funds he has parted with (*n*), and he is also liable to be charged with interest on the money he has to make good (*o*); but in a case where the legatee, to whom the money has to be made good, had full knowledge of the erroneous payment and acquiesced in the erroneous view of the Will, the Court did not make the executor pay interest (*p*).

The Court has the same jurisdiction as to costs as in an action commenced by writ.

The Court has the same jurisdiction as to costs on a summons properly taken out under Ord. LV. as in an ordinary administration action, and it can on such a summons, if the proper parties are before it, deal with the question of costs, although no estate or fund be sought to be administered (*q*).

New practice in administration actions.

The practice as to administration actions was changed by the Rules of the Supreme Court, 1883. "There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control without the existence of an administration suit. There were no means, according to the old practice, of bringing isolated questions under a Will before the Court for its determination except by an administration suit. It was felt that that very often involved parties in an amount of expense which was unnecessary, and which they ought to be relieved from" (*r*).

(*m*) See, for example, the remarks of Stirling, J., in *Re Partington*, 57 L. T. N. S. 660.

(*n*) *Saltmarsh* v. *Barrett*, 31 Beav. 349.

(*o*) *Att.-Gen.* v. *Köhler*, 9 H. L. C. 654. As to the rate of interest with which he is liable to be charged, see *ante*, p. 1490.

(*p*) *Re Hulkes*, 33 C. D. 552.

(*q*) *Re Medland*, 41 C. D. 476.

(*r*) Pearson, J., in *Re Wilson*, 28 C. D. 457, 460. And see observations of Farwell, J., in *Re*

Partial administration.

In order to avoid this expense, power is expressly given to the Court by the rules of 1883 to determine any question without making a judgment or order for the administration of a trust or of the estate of a deceased person, if the question between the parties can be properly determined without such judgment or order (*s*).

This power is not confined to the cases which can under Ord. LV. rr. 3 and 4, be raised by originating summons, but under Ord. LV. r. 10, the Court has this power, whether the question arise on summons "or otherwise."

This power extends to administration actions commenced before, but tried after, the rule came into operation (*t*).

Question as to whether general administration is necessary can be referred to chambers.

The question, whether in any particular case it is necessary that a general administration of the estate should be directed, can be referred by the Judge to be decided in chambers (*u*).

Grounds on which the Court still makes a decree for general administration.

One ground on which the Court has since the rules of 1883 directed a general administration is, that without it the executors or administrators cannot be adequately protected. For instance, where a testator had up to his death been engaged in the businesses of a merchant, shipbroker, insurance broker, and farmer, and was also the managing owner of six steamers, the proprietor of a colliery, and a partner in two other collieries—in addition, he was the sole defendant in a partnership action relating to one of the collieries, in which heavy claims were made against him by the partners—under these circumstances, questions arose whether any and which of his businesses ought to be carried on, and what ought to be done by his executors as to the defence of the pending action, and how and when his property ought to be realised. On these facts, Chitty, J., directed a general administration, and in addition directed special enquiries with regard to the testator's businesses and shares in ships (*x*).

Binding creditors.

It appears that no order short of a general administration order will bind creditors (*y*).

Skinner, [1904] 1 Ch. 289, 293, *post*, p. 1668, note (*d*).

(*s*) R. S. C. 1883, Ord. LV. r. 10.

(*t*) *Re Llewellyn*, 25 C. D. 66.

(*u*) *Ibid.*

(*x*) *Re Dickinson*, W. N. (1884), p. 199.

(*y*) See *Re Mills*, W. N. (1884), p. 21, where Pearson, J., appears to have adopted such a view; and *Re Barrett*, 43 C. D. 70, where North, J., held that an order for an account under Ord. XV. r. 1, did not put an end to the executor's right to prefer a particular creditor.

Smallness of assets.

In considering whether an order for general administration should or should not be made the Court will be governed by the circumstances of each case (*z*); the smallness of the assets is a material circumstance to decide the Court against making such an order (*a*).

A direction in a Will to obtain general administration does not deprive the Court of its discretion.

The fact that the testator has by his Will directed his trustees to commence an action for administration does not deprive the Court of its discretion to refuse to make an order for general administration; but the Court gives weight to such a direction in considering whether the order should, or should not, be made (*b*).

Order for general administration must be made by judge.

No order for general administration can be made except by the Judge in person (*c*).

Order for administration with a proviso limiting proceedings under it.

Where an executor or administrator either has proceedings commenced against him in respect of debts due from his testator or intestate, or is threatened with such proceedings, it is often very important that an order for general administration of the estate should be obtained, so as to protect it for the general body of creditors, or to give time to realise it properly. Where such a course is necessary there is power for the Court or a Judge to make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order, or under any particular account or inquiry directed, without leave of the Judge in person. Such an order can only be made where the application for administration is by a creditor or beneficiary, and where no accounts or insufficient accounts have been rendered, not where the application is by the executor or administrator (*d*).

Order to deliver accounts.

In the same way, upon an application for administration or execution of trusts by a creditor or a beneficiary where no accounts or insufficient accounts have been rendered, the Court

Orders for limited administration are often productive of expense only, as after a limited order has been made, an order for general administration is frequently found to be necessary. Where it is likely that ultimately an order for general administration will be required, the better way is for the order to be made at once, with a direction that no proceedings are to be taken under it without the leave of the Judge in person. See Ord. LV. r. 10a (b).

(*z*) See hereon *Re Wilson*, 28 C. D. 457, and *Re Gyhon*, 29 C. D. 834.

(*a*) *Re Jennings*, 28 Sol. Jo. 477.

(*b*) *Re Stocken*, 38 C. D. 319.

(*c*) R. S. C. 1883, Ord. LV. r. 15a.

(*d*) R. S. C. 1883, Ord. LV. r. 10a (b).

or Judge may order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings (*e*).

An absolute order for sale made in an administration suit operates as a conversion from the date of the order (*f*).

Costs.

Under R. S. C. 1883, Ord. LXV. r. 1 (*g*), subject to the provisions of the Acts and Rules, the costs of and incident to all proceedings in the Superior Court including the administration of estates and trusts are in the discretion of the Court or Judge. This general rule applies to all cases in which executors, administrators, or trustees, are instituting suits against strangers to their trust on behalf of their trust estate; and they are, when plaintiffs, subject to the same rules, and personally liable to pay costs, as if they were suing in their own right (*h*). But nothing in the rule is to deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules previously acted on in the Chancery Division (*i*).

General rule as to an executor's costs.

An executor or administrator fairly instituting an action for the direction of the Court, with regard to the trust, will not only be entitled to his own costs, but any person made a party to the suit, for the protection of the executor or administrator, will also have his costs out of the fund (*k*).

The question of an executor's or administrator's costs will be found dealt with in a subsequent chapter.

Charges and expenses should not be included in the "bill of costs."

It is a common mistake for executors and administrators in taking in their costs for taxation to include in them items of charges and expenses; this is wrong, as the charges and expenses should be included in their accounts, and allowed for when the accounts are taken.

Executors and administrators are not entitled to their charges

(*e*) Ord. LV. r. 10a (a). See as to the application of this rule, *Re Fish*, [1893] 2 Ch. at p. 427.

(*f*) *Hyett* v. *Mekin*, 25 C. D. 735.

(*g*) See *ante*, pp. 1533, 1534.

(*h*) Dan. Ch. Pr. 7th edit. p. 960. Their right to reimbursement out of the estate will be found dealt with *ante*, pp. 752, 753.

(*i*) See *post*, p. 1668.

(*k*) Dan. Ch. Pr. 1208, 7th edit. p. 988.

and expenses on taxation without an express direction that they are to be included in the taxation, as the executor or administrator is presumed to retain them out of the estate (*l*).

Practice in allowing charges and expenses.

The ordinary practice now is to allow executors or administrators their costs of action (out of their estate) as between solicitor and client, together with any charges and expenses, properly incurred relating to the trust, beyond costs of action, on the suggestion of counsel, of some particular expenses incurred, and the case must be supported before the taxing master; it is not the practice in taking the account in chambers to allow the charges and expenses incurred since the suit, but they are provided for on further consideration (*m*).

The charges and expenses of an executor or administrator do not include funeral and probate expenses (*n*), nor the costs of other actions unless specially provided for (*o*).

"Just allowances."

In taking any account directed by any judgment or order, all "just allowances" are made without any direction for that purpose (*p*).

The question what are just allowances is usually left to be decided on the taking of the account (*q*).

What are just allowances depends very much upon the circumstances of each case: it is, however, the settled rule, that whatever a trustee or personal representative has expended, in the fair execution of his trust, may be allowed him in passing his accounts (*r*).

Instances of allowances under this head.

Under the head of "just allowances" money which has been reasonably expended in taking opinions and procuring directions (*s*), payments by executors in discharge of legacies (*t*), deductions for dower out of rents received by a widow trustee (*u*), expenses of managing and carrying on a partnership business (*x*),

(*l*) *Humphreys* v. *Moore*, 2 Atk. 108.

(*m*) Seton, 6th edit., 1169, 1170.

(*n*) *Collis* v. *Robins*, 1 De G. & S. 131.

(*o*) *Payne* v. *Little*, 27 Beav. 83.

(*p*) Ord. XXXIII. r. 8.

(*q*) *Brown* v. *De Tastet*, Jac. 284, 294.

(*r*) Dan. Ch. Pr., 7th edit., pp. 857, 858. For instance, in the case of *Re Bird*, L. R. 16 Eq. 203, an executor was allowed money which he had paid to his solicitor on a misrepresentation by the solicitor, and which the latter had misappropriated.

(*s*) *Fearns* v. *Young*, 10 Ves. 184.

(*t*) *Nightingale* v. *Lawson*, 1 Cox, 23.

(*u*) *Graham* v. *Graham*, 1 Ves. Sen. 268.

(*x*) *Brown* v. *De Tastet*, Jac. 284, 299; *Cook* v. *Collingridge*, Jac. 607, 621.

and a mortgagee's expenses of seizing and holding possession of a ship, advertising it for sale, and effecting insurances upon it (*y*), have been allowed.

Improper employment of a solicitor.

An executor or administrator will not be allowed the charges of his solicitor for doing things which the executor ought strictly to have done himself (*z*).

Duty of the executor or administrator with regard to the business of the deceased.

When a trader dies, obviously his trade or business descends to his executors or administrators as part of his assets.

It is equally obvious that his trade or business must be either wound up or realized by his executors or administrators or be carried on by them.

The carrying on of the trade or business, too, may be either merely for the purpose of realization or it may be continued for the purpose of making a profit.

In carrying on the trade or business of the deceased for either of the above purposes, the following persons may be affected by the success or failure of the trading:—

(a) Creditors of the deceased.
(b) Beneficiaries under his Will.
(c) Creditors whose debts are incurred in the trading subsequently to the death of the deceased.

To carry it on until it can be realized.

Both an executor and an administrator are entitled, where the business of the deceased is a valuable asset, to carry it on for such reasonable time as may be necessary to enable them to sell it as a going concern, and also to an indemnity, even as against creditors, in respect of the liabilities properly incurred in so doing (*a*); but the executor or administrator who carries on the business of his testator makes himself personally liable for all debts so contracted, and it makes no difference that he avowedly acts as executor or administrator (*b*).

Liability of an executor carrying on the business of the deceased.

Business carried on not merely for the purpose of realization under a power.

Even where the business is not carried on merely for the purpose of realization, but under a power in the testator's Will, the executor is entitled to be indemnified by the estate against all liabilities properly incurred by him in so doing, not only as against beneficiaries, but also as against creditors, if they have assented to its being carried on, and if it has been carried

(*y*) *Wilkes* v. *Saunion*, 7 C. D. 188.

(*z*) *Harbin* v. *Darby*, 28 Beav. 325; and see *ante*, p. 1507.

(*a*) See *per* Lord Herschell in *Dowse* v. *Gorton*, [1891] A. C. 190, at p. 199.

(*b*) *Labouchere* v. *Tupper*, 11 Moo. P. C. 198. This subject will be found more fully treated of in an earlier chapter, see *ante*, p. 1430 *et seq.*; see also *post*, p. 1634 *et seq.*

on properly and *bonâ fide* in the interests both of beneficiaries and creditors (*c*); and the same principle applies, where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, even where the Will does not contain a power to carry on the business (*d*).

An administrator is only entitled to carry on the business of the intestate for the purpose of realization, and if he does any more than this he renders himself personally liable for the debts so incurred without any right of indemnity out of the intestate's estate (*e*). Any assets acquired in such trading belong to the intestate's estate, subject to the right of the administrator to be indemnified for what he has expended in obtaining such assets, if he is not a debtor to the estate; and a judgment creditor for the price of the assets stands, as against the estate, in no higher position than the administrator (*f*).

An administrator is only justified in carrying on the business for the purpose of realizing it.

An executor who is not expressly or impliedly authorized (*g*) by the Will of his testator to employ the whole or some part of the estate in carrying on the business is in the same position as an administrator (*h*).

An executor is on the same footing unless the Will authorizes him to carry on the business.

Where, however, the executor is authorized by the Will to carry on the business of his testator, and to apply the whole or some portion of the estate to that purpose, although he is personally liable for the debts he incurs in carrying on the business, he has the right to be indemnified out of the specific assets which he is authorized to employ in the business (*i*). If, however, the executor is in default to the specific trust

The executor's right to be indemnified out of the assets.

As against both bene-

(*c*) *Dowse* v. *Gorton*, [1891] A. C. 190. As to what constitutes such assent, see *Hodges* v. *Hodges*, [1899] 1 Ir. R. 480. The mere assent of the creditors is not sufficient to constitute the executor their agent: *Re Millard*, 72 L. T. 823.

(*d*) *Re Brooke, Brooke* v. *Brooke*, [1894] 2 Ch. 600.

(*e*) *Re Evans*, 34 C. D. 597. See also *Strickland* v. *Symons*, 22 C. D. 666; 26 C. D. 245.

(*f*) *Re Evans, supra.*

(*g*) As to what amounts to such an authority, see *ante*, p. 1431, note (*t*).

(*h*) A direction to carry on the testator's business authorizes the employment in it of the capital left in the business by the testator at his death: *M'Neillie* v. *Acton*, 4 D. M. & G. 744.

(*i*) *Ex parte Garland*, 10 Ves. 120; and cf. *Strickland* v. *Symons, ubi supra.* An administration order can be obtained by a creditor whose debt was incurred by executors in carrying on business under an authority in the Will, although the testator himself had incurred no debts which remained unpaid: *Re Shorey*, 79 L. T. 349.

ficiaries and creditors.

estate devoted to the business, the rule does not apply, nor can the creditors get their debts paid out of the specific assets, until the default is made good (*k*). He does not, however, lose his right of indemnity merely by reason of his failure to account, nor do the creditors lose their right of claiming through that indemnity against the estate (*l*).

An executor who carries on the business of his testator can sue as executor for debts incurred to the estate in carrying on the trade since the testator's death (*m*).

The subject of the rights and liabilities of an executor or administrator carrying on the business of the deceased will be found further dealt with in a subsequent chapter (*n*).

Trustee Act, 1893 (56 & 57 Vict. c. 53).

The Trustee Relief Acts, 1847—1849, and sect. 32 of the Legacy Duty Act, 1796 (*o*), which provided facilities for executors in the discharge of their duties and relief from some of the responsibilities incident to their office, have now been superseded by the Trustee Act, 1893. As to proceedings under this Act, see Order LIVB., R. S. C. (Trustee Act), 1893.

By sect. 50 of this Act the expressions "trust" and "trustee" are defined as including the duties incident to the office of personal representative of a deceased person. Sect. 42 of the Act provides as follows:—

Trustees may pay trust moneys or transfer stocks and securities into the High Court:

"(1.) Trustees or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

"(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

"(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the

(*k*) *Re Johnson, Shearman* v. *Robinson*, 15 C. D. 548.

(*l*) *Re Kidd*, 70 L. T. 648.

(*m*) *Abbott* v. *Parfitt*, L. R., 6 Q. B. 346.

(*n*) *Post*, p. 1634.

(*o*) 36 Geo. III. c. 52.

Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid or delivered."

As to lodgment under this section, see Ord. LIVB. r. 4. If the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which legacy duty has been paid or is not chargeable, the lodgment may be made (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force. By r. 41 of the Supreme Court Funds Rules, 1894, provision is made with regard to lodgment by a legal personal representative without an affidavit.

also into Post Office Savings Bank under sect. 70 of the County Courts Act, 1888.

Funds not exceeding 500*l.* in amount or value, held upon trusts within the meaning of the now repealed Trustee Relief Acts, could, under sect. 70 of the County Courts Act, 1888, be paid by the trustees into a Post Office Savings Bank, established in the town where the Court of the district in which any of the trustees or other persons reside is held, in the name of the Registrar of the Court, in trust to attend the orders of the Court, and the payment out could be ordered by the County Court. Presumably this provision is now to be read with the substitution of the Trustee Act, 1893, for the Trustee Relief Acts, but the Trustee Act, 1893, contains no provisions expressly relating to the jurisdiction of the County Courts, the only mention of which in the Act occurs in sect. 46. It would seem, however, by reference to the provisions of the Interpretation Act, 1889, that the County Courts have still jurisdiction as regards sums not exceeding 500*l.* in all cases where it previously existed (*p*).

Charity money should be paid to Official Trustee of Charitable Trusts.

Trustees who hold money belonging to a charity can pay the money to the Official Trustee of Charitable Trusts (*q*), and should not pay it into Court, although strictly speaking they have a right to do so if they choose (*r*).

(*p*) See Annual County Court Practice, 1904, p. 508.

(*q*) Under 18 & 19 Vict. c. 124, sects. 22 and 23.

(*r*) *Re Poplar School*, 8 C. D. 543.

Money paid into Court under sect. 42 of the Trustee Act, 1893, was ordered by North, J., to be paid out without a petition (*s*). And in *In re Hood's Trusts* (*t*), the same judge ordered payment out to the executor of funds paid in by the administrator of a supposed intestate before the discovery of a Will, on the executor's petition.

Under R. S. C. (Trustee Act), 1893, Ord. LIVB. r. 5, applications under the Trustee Act relating to funds paid into Court may be made by summons in any case coming within the provisions of Ord. LV. r. 2. The latter rule includes the following (amongst others) applications:—

"(1.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity or of the birth, marriage, or death of any person:

"(2.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed 1,000*l.* or the securities do not exceed 1,000*l.* nominal value:"

Costs of paying the fund into and out of Court.

As a general rule, the costs of paying a fund into Court by the executor or administrator ought to be paid out of the general estate (*u*), but if the fund has already been completely severed from the general estate, and appropriated, the costs of payment in ought to come out of the fund itself (*x*). The costs of paying the fund out of Court generally fall upon the fund itself (*y*), but the Court can, on a proper application, order them to be paid by the general estate, where such general estate remains in the hands of the executor (*z*).

Trustee's costs of payment into and out of Court.

The trustee paying money into Court is *primâ facie* entitled to his costs of payment in and of his appearance on the petition or summons for payment out, but the Court has a discretion to deprive him of costs if he pays money in vexatiously (*a*), but

(*s*) *Pullen* v. *Isaacs*, W. N. (1895) 90.

(*t*) [1896] 1 Ch. 270.

(*u*) *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679.

(*x*) *Re Lorimer*, 12 Beav. 521.

(*y*) *Re Dickson*, 1 Sim. 37; *Re Ross, ibid.; Re Jones, supra; Re Robertson*, 6 W. R. 405; *Re Wilson*, 14 W. R. 161.

(*z*) *Re Trick*, L. R. 5 Ch. 170; *Re Birkett*, 9 C. D. 576; and *Re Gibbons' Will*, 36 C. D. 486.

(*a*) See Morgan's Chancery Acts, 6th edit. 54.

not when he acts under a mere misapprehension (*b*). Upon the application for payment out, the jurisdiction of the Court is limited to the fund which has actually been brought into Court; and it cannot order repayment by the trustees of costs and expenses deducted by them on the payment in; if it can be shown that the costs and expenses have been improperly retained, separate proceedings must be taken against the trustees to recover the amount (*c*).

Trustees should not pay funds into Court unnecessarily.

The occasions on which trustees should pay funds in their hands into Court have been considerably lessened by the rules of the Supreme Court (*d*). Under Ord. LV. r. 3, trustees can now obtain the directions of the Court cheaply and quickly, in many cases in which formerly they would have been properly advised to pay their funds into Court. For instance, trustees who are desirous of ascertaining who are the persons entitled to a fund, or of having the question who are entitled to the fund determined by the Court, should not pay the fund into Court under the Trustee Act, 1893, but should take out a summons under Ord. LV. r. 3 (*e*), to have such persons ascertained by the Court (*f*). Trustees should also remember that the payment of funds into Court, and the subsequent application for payment out of Court, are expensive processes which ought to be avoided, in the interests of their *cestui que trust*, where any other reasonable and safe course is open to them (*g*).

Executors and administrators are entitled, after taking reasonable means for ascertaining the debts owing by the dead man (and, in the case of administrators, the persons properly claiming as next of kin), to distribute the balance of the estate amongst the beneficiaries and next of kin respectively.

22 & 23 Vict. c. 35, s. 29. Executors, &c., may distribute assets

By Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 29 (*h*), it is provided that where an executor or administrator shall have given proper notices (*i*) for creditors and others to send in their

(*b*) *Re Jenkins*, 3 N. R. 408.

(*c*) *Re Parker's Will*, 39 C. D. 303.

(*d*) R. S. C. 1883.

(*e*) See *ante*, pp. 1543, 1544.

(*f*) *Re Giles*, 55 L. J. Ch. 695.

(*g*) Cf. *Re Gibbons' Will*, 36 C. D. 486.

(*h*) Sect. 29 of this Act will be found fully set out, *ante*, p. 1083.

(*i*) As to advertisements, see R. S. C. Ord. LV. r. 44. See also *Wood* v. *Weightman*, L. R. 13 Eq. 434, and Dan. Ch. Pr. 7th edit. 825. There is no rule of practice that in every case the advertisement must be inserted in the "Times" or some other London daily newspaper, in addition to the "London Gazette": *Re Bracken*, 43 C. D. 1.

after due notice to creditors and others to send in claims.

claims, he may at the expiration of the time named in the notices distribute the assets amongst the parties entitled, having regard to the claims of which he has then notice, and is not liable for assets so distributed to any person of whose claim he has not had notice; but the right of any creditor or claimant to follow the assets is not prejudiced by the section (*k*).

The section applies to claims of next of kin as well as creditors (*l*). But it does not, of course, protect executors against claims of which they have notice (*m*). It protects them whether they have paid over the legacies or only appropriated them, the legacies in the latter case being no longer in their hands *quâ* executors (*n*).

Methods of obtaining the advice and direction of the Court.

There are several ways in which the opinion and directions of the Court can be obtained where the parties interested are agreed as to the point which they wish to be decided, without going to the expense of an action protracted through all its stages.

Trustee, executor, &c. may apply by petition to judge of Chancery for opinion, advice, &c. in management, &c. of trust property.

Section 30 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), provided that trustees, executors, or administrators might apply by petition for the advice or opinion of the judge in matters respecting the administration of trust property or the assets of a testator or intestate, but this section was repealed by the Trustee Act, 1893.

The following methods are, however, still open for the adoption of executors or administrators:—

1. Application by originating summons under Ord. LV. r. 3. The cases in which the opinion and directions of the Court can be obtained on originating summons will be found dealt with in an earlier part of this chapter (*o*). This method may be said to be now almost universally adopted, to the exclusion of those mentioned below, which, though still open to adoption, are in practice seldom used by executors or administrators for the above-mentioned purpose.

2. Special case. A special method of obtaining the opinion of the Court by means of a special case was provided by the Act

(*k*) Sect. 27 of this Act enables executors and administrators to distribute the dead man's estate after providing for liabilities on leaseholds held by him.

(*l*) *Newton* v. *Sherry*, 1 C. P. D. 246.

(*m*) *Re Land Credit of Ireland*, W. N. (1872), p. 210; *Wood* v. *Wood*, 21 W. R. 135.

(*n*) *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *Hunter* v. *Young*, 4 Ex. D. 256.

(*o*) *Ante*, p. 1543 *et seq.*

13 & 14 Vict. c. 35 (*p*). This statute was repealed by 46 & 47 Vict. c. 49, but its provisions are kept alive by Ord. XXXIV. r. 8, which provides: "Any special case may hereafter be stated, for the same purposes and in the same manner as was provided by the Act 13 & 14 Vict. c. 35, and the same shall be deemed to be a special case stated in a matter within the meaning of the order" (*q*). It is presumed, however, that the rule cannot have the effect of reviving the procedure under the Act.

3. Action. Under the new practice of the rules of the Supreme Court the institution of an action is not a very expensive procedure, and where the facts can be agreed on between the parties they can be stated in the plaintiff's statement of claim, and the action brought on for hearing on the facts so stated. In an action so instituted, the Court has full jurisdiction over the whole matter, and can make binding declarations of right, whether any consequential relief is or could be claimed or not (*r*).

4. The questions may be raised on issues of fact without pleadings (*s*). As this method presents no special advantage to executors or administrators, no further mention need here be made of it.

Salvage cases.

The Court has sometimes, on the principle of salvage, authorized an expenditure out of capital, for the purpose of preventing loss or destruction to settled property, which ordinarily should be paid for out of income. In *Conway* v. *Fenton* (*t*), Kekewich, J., authorized trustees of a settlement to lay out 800*l.*, part of settled personalty, in repairs and improvements on a farm forming part of the real estate comprised in the same settlement. This expenditure was authorized on evidence that the farm could not be let or sold, and that it would deteriorate unless the repairs were done, and that the tenants for life could not make the expenditure out of their income (*u*). The principle seems to have been carried to its fullest extent in the case of

(*p*) See sects. 1 and 15.

(*q*) For the practice under the 13 & 14 Vict. c. 35, see Morgan's Chancery Acts, 6th edit. p. 403. And see also Ann. Pr. 1904, p. 448; Dan. Ch. Pr. 7th edit. 1682.

(*r*) See Ord. XXV. r. 5.

(*s*) Ord. XXXIV. rr. 9—12.

(*t*) 40 C. D. 512.

(*u*) See also *Frith* v. *Cameron*, L. R. 12 Eq. 169; *Re Jackson*, 21 C. D. 786; *Glover* v. *Barlow*, 21 C. D. 788, note; *Re Household*, 27 C. D. 553.

Re Household (*x*), where Bacon, V.-C., in exercise of such a jurisdiction, authorized the trustees of real and personal estate devised and bequeathed on trust for a father for life, with remainder to his children, to advance part of the money to the father (the tenant for life) for the purpose of stocking and cultivating a farm forming part of the real estate, the evidence showing that the farm could not be let at a remunerative rate, and, unless the advance was made, the farm would go out of cultivation and deteriorate in value (*y*).

Sale of testator's business to a company.

In the case of *Re Crawshay* (*z*) an application was made to the Court to sanction the sale of large businesses, in which the testator was interested, to a limited company formed for the object of acquiring such businesses. The testator had given large legacies, some of which were settled, and the evidence showed that it was impossible to satisfy the testator's creditors and beneficiaries without a realization of the testator's partnership businesses and properties, and it was considered that such businesses and property if sold at once would, in consequence of trade depression, be sold at a serious sacrifice. The proposed scheme provided that the proposed company should pay for the businesses and property by means of debentures and fully paid-up shares in the company, which were to be appropriated to the persons entitled to the pecuniary legacies or their trustees. The Will contained a power to invest in "the stocks, funds, shares and debentures, mortgages or securities of any corporation or company." North, J., held that he had no jurisdiction to sanction the scheme, which he thought an alteration of the trusts of the Will, the investment clause only contemplating a going company, but he gave leave to apply to Parliament for a private Act authorizing the carrying out of the proposed scheme.

The ground on which North, J., held that the investment clause did not apply, namely, that the power contemplated a sale to a going company, not to a company merely formed to define and limit the liability of the persons already interested in the partnership business, seems a narrow one, and the same remark applies to another ground stated by his Lordship, that

(*x*) 27 C. D. 553.

(*y*) In *Re Lever*, [1897] 1 Ch. 32, the cost of sanitary works executed under the Public Health (London) Act, 1891, upon leasehold houses forming part of a residuary bequest to trustees upon trust for tenant for life and remaindermen was held payable out of the capital of the residuary estate.

(*z*) 60 L. T. 357.

the power contemplated a sale, and by the scheme the parties would not sell but retain the property in specie, as wherever property is sold for shares in a company the seller to some extent retains an interest in the property sold. The cases in which the Court has exercised its original jurisdiction over settled property in order to prevent its loss or destruction do not appear to have been cited in *Re Crawshay* (*a*), but the principle embodied in them would seem to apply to such a case.

The principles which were the subject of discussion in *Re Crawshay* have been further considered in three recent cases—namely, *Re Morrison* (*b*), *Re New* (*c*), and *Re Tollemache* (*d*). Of these cases *Re New* went to the Court of Appeal, and the following observations of Romer, L. J., who delivered the judgment of the Court, are important as showing the broad principles upon which the Court will proceed in deciding similar cases. "In the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the *cestuis que trust*, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency which has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. . . . Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries

(*a*) 60 L. T. 357.
(*b*) [1901] 1 Ch. 701.
(*c*) [1901] 2 Ch. 534.
(*d*) [1903] 1 Ch. 457.

merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character" (*e*). In this case the Court authorized the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realizable shares (fully paid) and debentures in the proposed new or reconstructed company.

(*e*) [1901] 2 Ch. 544.

BOOK THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS.

IN the last place, it is proposed to treat of the Remedies against executors and administrators, by means of which their various duties and liabilities may be enforced in the King's Bench and Chancery Divisions of the High Court of Justice respectively.

Foreign executors.

Before entering on this subject, it may be remarked, that no suit can be brought against any executor or administrator, in his official capacity, in the Court of any country but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him (*a*). Therefore, if a foreign creditor wishes a suit to be brought here, in order to reach the effects of a deceased testator or intestate situate in England, it will be necessary, before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an English personal representative should also be duly constituted by grant from the Probate Court here; for the foreign executor or administrator is not liable to be sued, in his official character, in this country (*b*). But it must be observed, that if he should collect the effects or debts of the deceased found or due in England, without taking out letters of administration here, he would thereby become liable as executor *de son tort*, to the extent of the assets so received by him (*c*).

(*a*) Story's Confl., sect. 513.

(*b*) *Tyler* v. *Bell*, 1 Keen, 826, 829; Story's Confl., sects. 513, 514; *Flood* v. *Patterson*, 29 Beav. 295.

(*c*) See *ante*, p. 183 *et seq.* So an English company that, at the request of American executors, had registered a transfer into their names of their testator's shares without probate being obtained in this country, was held to have made itself executor *de son tort*: *Att.-Gen.* v. *The New York Breweries Co., Ltd.*, [1898] 1 Q. B. 205; [1899] A. C. 62. But in a suit in equity for an administration decree, in the presence of an executor *de son tort* in Court will not dispense with that of a regular representative: *Penny* v. *Watts*, 2 Phil. Ch. C. 152. See *post*, p. 1646 *et seq.*

CHAPTER THE FIRST.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS AT LAW.

No action lay at common law against an executor in which the testator could have waged his law.

AN action of *debt* did not formerly lie against an executor or administrator upon a simple contract, when the testator or intestate could have waged his law (*a*).

But stat. 3 & 4 Will. IV. c. 42, s. 13, abolished wager of law, and by sect. 14 enacted that "an action of debt on simple contract shall be maintainable in any Court of Common Law against any executor or administrator."

Action of account.

No action of account lay against an executor or administrator at common law; because the account rested in the privity and knowledge of the deceased only (*b*): But this action was given by stat. 4 & 5 Ann. c. 16, s. 27.

No action at law lies against an executor for a general legacy:

An action does not lie against an executor for a general legacy (*c*) even though he may have expressly promised to pay (*d*).

And an action at law for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay (*e*).

(*a*) *Barry* v. *Robinson*, 1 N. R. 293; Wager of law or *radiatio legis* was an ancient mode of proceeding, whereby, in an action of debt brought upon a simple contract between the parties, without deed or record, the defendant might discharge himself by swearing in a Court in the presence of compurgators, that he oweth the plaintiff nothing in manner and form as he hath declared. In the time of Lord Coke it had become customary, instead of bringing actions of debt, to bring actions upon the case upon the defendant's promise, wherein he could not wage his law. See Bac. Abr. "Wager of Law."

(*b*) Co. Litt. 89, *b*; 2 Inst. 404.

(*c*) *Deeks* v. *Strutt*, 5 T. R. 690. See *ante*, p. 1422.

(*d*) *Jones* v. *Tanner*, 7 B. & C. 542.

(*e*) See accord. *Holland* v. *Clark*, 1 Y. & C. Ch. C. 151, 167, *per* Knight Bruce, V.-C. See also *Johnson* v. *Johnson*, 3 B. & P. 169, where Lord Alvanley, C. J.,

But the law is different with respect to *specific* legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor (*f*). Therefore, a devisee of chattel leaseholds may bring an action to recover them against the executor, after an assent by him to the bequest (*g*). So an action of trover will lie for a specific legacy, after the executor has assented (*h*).

secus, as to a specific legacy after assent:

It must also be observed, that executors may, by arrangement with the legatees, cease to hold the money bequeathed in their character of executors; in which case they are obviously liable to be sued at law; Thus, in *Gregory* v. *Harman* (*i*), the plaintiff and three others being residuary legatees under the Will of one T. P., the defendants, as the executors named in the Will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands; and it was held, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law. Again, in *Hart* v. *Minors* (*k*), E. by Will bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, upon trust to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, E. T., J. W., and J. H., and the remaining shares as therein mentioned, and appointed M. his executor, who duly proved the Will: M. having taken upon himself the execution of the Will, called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of the legatees the greater portion of

or where he has ceased to hold the money as executor:

observed that, "if an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a Court of Common Law would not entertain an action for money had and received against a legatee, since such a Court cannot take into consideration, as a Court of Equity would do, the mode in which the funds might have been applied." See as to an action for a legacy charged on land, *Braithwaite* v. *Skinner*, 5 M. & W. 313.

(*f*) *Ante*, p. 1107, note (*a*). And see *Re Culverhouse*, [1896] 2 Ch. 251.

(*g*) *Doe* v. *Guy*, 3 East, 120.

(*h*) *Williams* v. *Lee*, 3 Atk. 223.

(*i*) 1 Moore & P. 209.

(*k*) 2 Crompt. & M. 700.

their share of the residue, and was about to pay J. H., but was prevented from so doing: Another meeting was afterwards called, at which J. H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, amongst others, with having paid "cash for legacy duties:" To this was appended a supplemental account, containing, amongst others, the following item: "By cash retained for J. H., 179*l.* 10*s.*:" In an action for money had and received, and on an account stated, brought by J. H. against the executor to recover the amount of the legacy, it was held by the Barons of the Exchequer, that the action was maintainable, on the ground of a certain sum having been received and retained by the defendant for the plaintiff's use, by which the defendant ceased to hold the money in his character of executor (*l*).

51 & 52 Vict. c. 43: legacy, &c., not exceeding 50*l.* recoverable in County Court.

The jurisdiction of the County Courts is, by stat. 51 & 52 Vict. c. 43, s. 58, extended to the recovery of a demand not exceeding 50*l.*, for the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a Will.

Where money is bequeathed to an executor in trust, that is, where he has trusts to perform with respect to the bequest which do not form part of the ordinary duties of an executor, the case is not within section 58 (*m*), but a bequest, though made in terms to an executor in trust, will be within the section if the executor has really nothing more to do than he would be bound to do upon a simple bequest to a legatee (*n*). And all cases involving the administration of estates or the execution of trusts within and to the amount of 500*l.* are within the equity jurisdiction conferred on the County Courts by sect. 67.

(*l*) See also *Gorton* v. *Dyson*, 1 Brod. & Bing. 219; *Moert* v. *Moessard*, 1 Moore & P. 8; *Rose* v. *Savory*, 2 Bing. N. S. 145; *Wasney* v. *Earnshaw*, 4 Tyrwh. 806; *Roper* v. *Holland*, 3 A. & E. 99; *Edwards* v. *Bates*, 7 M. & Gr. 590; *Bartlett* v. *Dimond*, 14 M. & W. 49, 56; *Pardoe* v. *Price*, 16 M. & W. 459, by Rolfe, B.; *Bond* v. *Nurse*, 10 Q. B. 244; *Edwards* v. *Lowndes*, 1 E. & B. 81; *Topham* v. *Morecroft*, 8 E. & B. 972.

(*m*) *Hewston* v. *Phillips*, 11 Exch. 699. See further, as to what is a claim for a legacy, *Longbottom* v. *Longbottom*, 8 Exch. 203.

(*n*) *Pears* v. *Wilson*, 6 Exch. 833. See also *Re Fuller*, 2 E. & B. 573. The County Court may well try a question of *devastavit* in such a suit: *Winch* v. *Winch*, 13 C. B. 128. The grant of letters of administration is part of the cause of action: *Re Fuller*, 2 E. & B. 573.

Parties.

It has been shown (*o*), that in the case of an action brought *by* executors, they should all join, whether they have administered or not (*p*). But the rule as to joinder was different in actions *against* executors or administrators: Therefore, where the defendant pleaded in abatement that he had one or more co-executors who ought to be joined, he must have averred, not only that the co-executor was alive (*q*), but that he had *administered;* because it was only necessary to sue so many of the executors as had administered (*r*).

Action against married woman executrix.

Formerly in an action against a married woman executrix, the husband must have been joined as a defendant, but now by the Married Women's Property Act, 1882, sect. 18, a married woman who is an executrix or administratrix alone or jointly with any other person or persons may sue or be sued without her husband as if she were a *feme sole;* and by sect. 24 of the same Act, her husband is not subject to any liabilities by reason of any breach of trust or *devastavit* committed by her either before or after her marriage, unless he has acted or intermeddled in the administration. Where, however, a married woman administratrix is ordered to pay into Court a sum of money belonging to the intestate's estate, and shown by her account to be in her possession, the order should be in the common form, and not restricted to payment out of her separate estate in the absence of evidence that she has committed a *devastavit* (*s*). If, however, the object of the order is to compel her to make good the loss caused by her *devastavit*, the order must, it would seem, be in the form in *Scott* v. *Morley* (*t*), viz., against her separate estate, and no attachment for non-compliance with it can go (*u*).

(*o*) *Ante*, p. 1515.

(*p*) This, however, is subject to the operation of R. S. C. 1883, Ord. XVI. r. 11, set out *ante*, p. 1515.

(*q*) *Hilbert* v. *Lewis*, 1 Freem. 268. Pleas in abatement are now abolished. See *ante*, p. 1515, n. (*u*).

(*r*) Bro. Exors. 20, 88; Wentw. Off. Ex. 205, 14th edit.; *Swallow* v. *Emberson*, 1 Lev. 161.

(*s*) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180. See also *post*, p. 1664, note (*a*).

(*t*) 20 Q. B. D. 120. As to the immunity attaching to the separate property of a married woman in respect of which she is restrained from anticipation, see *Brown* v. *Dimbleby*, [1904] 1 K. B. 28, and cases referred to in judgment of Collins, M. R. And see also *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35; *Gordon* v. *Gordon*, [1904] P. 163.

(*u*) Seton, 6th edit. 885, 892.

Action against surviving executor.

If one of two executors dies, an action cannot be brought against the surviving executor and the executor of the deceased executor, but must be against the survivor alone (*x*).

Executors and administrators represent the persons beneficially interested.

By Ord. XVI. r. 8, it is provided that trustees, executors and administrators may be sued on behalf of, or as representing the property or estate of which they are trustees or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties (*y*).

Effect of defence of *plene administravit* on form of judgment.

There seems no reason why a plaintiff should not obtain judgment under Ord. XIV. against an executor who does not set up a defence of *plene administravit*, although an executor can of course obtain leave to defend more readily than his testator could have done. It would seem to have been decided at Chambers that, when the executor successfully sets up *plene administravit*, the plaintiff is entitled to a judgment with costs against future assets *quando acciderint*, but that the executor is entitled to costs of action as against the plaintiff (*z*).

Service on one of two co-executors sufficient in action for recovery of land.

Service on one of two co-executors, who are in possession of the premises, would seem to be a sufficient service in an action for recovery of land (*a*).

In an action against an executor, as such, he must be named executor, as it is provided by R. S. C. 1883, Ord. III. r. 4, that if the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show in manner appearing by such of the forms in Appendix A. Part III. Sect. VII. as shall be applicable to the case, or by any other statement to the like effect, in what capacity the defendant is sued (*b*). Under the law as it existed prior to the Judicature Act it was settled

In an action against executor, as such, the indorsement of the writ should show in what capacity he is sued.

(*x*) 1 Roll. Abr. 928, tit. Exors. (Z). But if the executor of the executor administer with the other, an action lies against both as executors: *Ibid.* It is not necessary, as a rule, in an action for an account in the Chancery Division to add the representative of a deceased executor as a party, but where it is desirable to join such representative R. S. C. 1883, Ord. XVI. r. 11 (*ante*, p. 1515), or r. 48 (as to third-party procedure) may be applied: *Re Harrison*, [1891] 2 Ch. 349.

(*y*) See *ante*, p. 1545.

(*z*) See Annual Practice, 1904, p. 125.

(*a*) *Doe* d. *Strickland* v. *Roe*, 4 D. & L. 431.

(*b*) There was a similar rule

that if, upon the whole matter, the plaintiff had declared against the defendant as executor, it was considered that the judgment might well be *de bonis testatoris*, although the defendant was not named executor at the beginning of the declaration (*c*): Thus it was enough in an action of covenant on a demise to the testator, to state that he made his Will and appointed the defendant *his executor*, who entered and was possessed *as executor;* for this averment might be traversed by the defendant (*d*).

Practice prior to Judicature Act.

Statement of claim: how defendant to be charged as executor.

Formerly a plaintiff could not have an action against a defendant to charge him as executor, and also in his own right: for the judgment in the one case was *de bonis propriis*, and in the other *de bonis testatoris* (*e*).

Joinder of counts.

But now by R. S. C. 1883, Ord. XVIII. r. 5, it is provided that "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*f*). With regard to the corresponding rule of the Rules of 1875 (Ord. XVII. r. 5), Hall, V.-C., made the following observations in *Padwick* v. *Scott* (*g*): "In suing an executor or administrator it frequently becomes a question whether he should be sued as legal personal representative or personally; and the minds of the framers of Order XVII. Rule 5, were directed to *Ashby* v. *Ashby* (*h*), and cases of the same class, where the executor or administrator has been dealing with the assets, or making contracts in the course

before the Judicature Act; see Com. Dig. Pleader (2 D. 2).

(*c*) *Dean of Bristol* v. *Guyes*, 1 Saund. 112, *a*; *Rann* v. *Hughes*, 4 Bro. P. C. 27, Toml. edit.; Com. Dig. Abatement (F. 20); *ibid.* Pleader (2 D. 2).

(*d*) *Holliday* v. *Fletcher*, 2 Lord Raym. 1510; *S. C.*, 2 Stra. 781. If the plaintiff declared in the *debet* and *detinet* against an executor or administrator, in cases where he ought to have sued in the *detinet* only, the declaration was bad on demurrer, though it was aided by verdict: *Fruen* v. *Porter*, 1 Sid. 379. But it was held in *Wilson* v. *Hobday*, 4 M. & S. 120, that no objection could be made to a declaration in the *detinet*, which might, and strictly ought to have been, laid in the *debet* and *detinet;* for a party might abridge his demand, though he could not extend it. See *ante*, p. 1388, note (*h*).

(*e*) *Herrenden* v. *Palmer*, Hob. 88; *Hall* v. *Huffam*, 2 Lev. 288.

(*f*) It has been held that this rule does not apply to counterclaims: *Macdonald* v. *Carington*, 4 C. P. D. 28; *ante*, p. 1521.

(*g*) 2 C. D. 736, 743.

(*h*) 7 B. & C. 448; *ante*, p. 1415.

of administration properly and fairly in his character of executor or administrator, and then it becomes a question whether, the contracts being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character, being left afterwards to get payment if he could out of the assets in a course of administration. The object of that clause was to get over such difficulties."

Defences:

In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded (*i*); and in addition thereto he may specifically deny the character in which he is sued, which was formerly done by pleading *ne unques executor or administrator;* or admitting it, he may plead that he has no assets in his hands, and that either generally, or specially, with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff; or he may plead a retainer to pay his own debt of equal or superior degree, or debts of a superior degree due to third persons (*k*).

plea of executor's bankruptcy:

Unless a *devastavit* is suggested, a plea by an executor or administrator of his own bankruptcy is not pleadable: as the proceedings in bankruptcy would not bind any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fi. fa.* (*l*).

pleas by several executors.

If there are several executors, they may plead different pleas; and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors, upon a promise made by the testator, if one executor acknowledges the action, and the other three plead *non-assumpsit*, their plea shall be received (*m*). Hence, if a warrant of attorney be given by one of several executors to confess judgment against them all, the Courts will order it to be delivered up (*n*). So

(*i*) Com. Dig. Pleader (2 D. 8).

(*k*) Tidd, 644, 9th edit.

(*l*) See *Serle* v. *Bradshaw*, 2 Cr. & M. 148; *ante*, p. 475.

(*m*) *Chaffe* v. *Kelland*, 1 Roll. Abr. 929, tit. Exors. (A.), pl. 1; Wentw. Off. Ex. 212, 14th edit.; *Elwell* v. *Quash*, 1 Stra. 20. So if two executors have judgment, and the one prays a *capias*, and the other a *fieri facias*, the *capias* shall be awarded, as best for the testator: *Foster* v. *Jackson*, Hob. 61, cited as the opinion of Cotismore in 7 H. 6, 6. Although the forms of pleading have been altered by the Judicature Acts, there seems to be nothing in those Acts to impugn the general principles laid down in the authorities cited for the propositions under this head in the text.

(*n*) *Elwell* v. *Quash*, 1 Stra. 20; Tidd, 548, 9th edit.

where one executor pleaded a good plea, and the other a bad one, on demurrer, judgment was given in C. B. for both the defendants; but it was reversed on error, and a new judgment given for the plaintiff against one executor only (*o*).

Where several executors plead a release to the testator or to themselves, and one of them afterwards makes default, this shall not be a total default in the defendants, so as to induce a judgment against them (*p*).

Plea of *ne unques executor*, &c.:

If the defendant intends to deny his being executor or administrator, he must plead such denial specifically (*q*); otherwise he will admit his representative character. The plea of *ne unques executor* or *ne unques administrator* is a plea in bar (*r*): But a plea to an action brought against the defendant as executor, that he was administrator and not executor, was, under the old system, a plea in abatement only (*s*), which now could be easily remedied, if necessary, by amendment. So, in an action against the defendant as administrator, a plea that he was not administrator but executor, could only be in abatement (*t*). So, if he were sued as administrator generally, he must have pleaded in abatement that he was administrator only *durante minoritate* (*u*).

On the trial of an issue joined on a plea of *ne unques executor* or *administrator*, the *onus* of proof is on the plaintiff, who has to prove the affirmative of the proposition.

If the fact that a party is executor is denied by the opposite party (*x*), proof that the defendant has intermeddled with the

(*o*) *Baldwin* v. *Church*, cited 1 Stra. 20. Demurrers are now abolished, but points of law which formerly would have been raised by demurrer can now be raised by the pleadings under Ord. XXV. r. 2. As to the costs where defendants sever in their pleadings, see *Stumm* v. *Dixon*, 22 Q. B. D. 99; *ibid.* 529.

(*p*) Wentw. Off. Ex. 213, 14th edit.

(*q*) R. S. C. 1883, Ord. XIX. r. 13.

(*r*) Com. Dig. Pleader (2 D. 7).

(*s*) *Pyne* v. *Woolland*, 2 Vent. 178; *Harding* v. *Salkill*, 1 Salk. 296; *Granwell* v. *Sibly*, 2 Lev. 190; Com. Dig. Pleader (2 D. 3), (2 D. 7).

(*t*) Com. Dig. Abatement (F. 20); Pleader (2 D. 12); Com. Dig. Pleader (2 D. 4). Now by R. S. C. 1883, Ord. XXI. r. 20, no plea or defence shall be pleaded in abatement.

(*u*) *Little* v. *Plant*, 1 Lutw. 20; Com. Dig. Pleader (2 D. 12).

(*x*) Such denial must be specifically pleaded: see R. S. C. 1883, Ord. XIX. r. 13.

property, so as to make himself executor *de son tort* (*y*), is sufficient proof of his being executor (*z*).

It was said that the plaintiff would fail on an issue joined on a plea of *ne unques executor*, unless he could prove not only the appointment of the defendant as executor, but also that he had taken upon himself to act as such, or had proved the Will. But it is laid down in a book of authority, that an executor who proves the Will, though he does not otherwise administer, cannot plead *ne unques executor;* And that, if there be two executors, and one proves it in the name of both, even against the will of the other, yet he cannot plead *ne unques executor* nor administer as executor (*a*).

For the purpose of introducing formal and documentary evidence of the defendant being executor or administrator, it is always prudent, and in some cases absolutely necessary, to give notice to the defendant to produce at the trial the probate of the Will, or the letters of administration (*b*). But it is not also necessary, in order to let in secondary evidence, to prove that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession (*c*). Some evidence of the identity of the party, namely, that the person, described in the documentary evidence as executor or administrator, is the party sued, will be indispensably necessary (*d*).

plea by administrator whose letters have been revoked:

If the defendant, being sued as administrator, pleads, that before the date of the writ, his administration was revoked and granted to another, he ought to allege that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrator (*e*). Accordingly,

(*y*) As to the acts by which a person will make himself executor *de son tort*, see *ante*, p. 183 *et seq.*

(*z*) See *ante*, p. 190. The plaintiff may reply that the defendant has administered: *Keble* v. *Keble*, Hob. 49; Com. Dig. Pleader (2 D. 7); or that goods of the testator to a certain value came to the defendant's hands before administration granted: *Kellow* v. *Westcombe*, 1 Freem. 122; *Hinde* v. *Skelton*, 34 L. J. N. S. Ch. 378; 2 H. & M. 690. As to the proper plea by an executor who has administered under a Will, which has been afterwards disproved, see *ante*, p. 184, note (*l*).

(*a*) Com. Dig. Pleader (2 D. 7). See also Wentw. Off. Ex. c. 15, p. 339, 14th edit.

(*b*) 2 Phill. Ev. 346, 6th edit.

(*c*) 2 Phill. Ev. 347, 6th edit.

(*d*) *Ibid.*

(*e*) *Garter* v. *Dee*, 1 Freem. 13, *ante*, p. 466. These goods, as in the case of goods possessed by an executor *de son tort*, shall not be assets in the hands of the new ad-

if an administrator wastes the goods, and afterwards administration is committed to another, yet any creditor may charge him in debt, and if he pleads the last administration committed to another, the other may reply that before the second administration committed, he had wasted the goods (*f*).

plea of the Statute of Limitations:

Creditors in respect of debts which the testator or intestate contracted more than six years before the commencement of the suit used formerly to attempt to take the case out of the Statute of Limitations by basing the case on a count or counts upon oral or implied promises by the executor or administrator as such.

Stat. 9 G. IV. c. 14: acknowledgment or promise to be in writing signed by the party chargeable thereby:

But by stat. 9 Geo. IV. c. 14, s. 1, after reciting the Statute of Limitations, 21 Jac. I. c. 16, and the Irish Act, 10 Car. I., it is enacted, that "in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby (*g*); and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever" (*h*).

no joint contractor to lose benefit of statute by reason only of written acknowledgment or promise of co-contractor:

ministrator, until they come to his possession: *Ibid.*; *Keble* v. *Keble*, Hob. 49.

(*f*) *Packman's Case*, 6 Co. 18, *b*.

(*g*) Extended to writings signed by an agent under the provisions of stat. 19 & 20 Vict. c. 97, s. 13.

(*h*) In an action by an administratrix, to which the Statute of Limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance, which the defendant promised verbally to pay: it was objected that this was within the 9 Geo. IV. c. 14: But Vaughan, B., said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply in cases where you go for the original debt, and then give some evidence of an acknowledgment to

But it is also provided by the same section, that "in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall

rebut the presumption raised by the Statute of Limitations, that the debt has been satisfied:" *Smith* v. *Forty*, 4 Carr. & P. 126. See also *Ashby* v. *James*, 11 M. & W. 542, accord. A testator being, at the time of his death, in 1857, indebted to B. on simple contract, gave by his Will his real and personal estate to his wife for life, and appointed J. and E. executors. The Will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the Will was proved, and then B. filed his bill on behalf of himself and other creditors against the widow and the executors. And it was held that the claim was barred by the Statute of Limitations, for the cause of action having accrued in the testator's lifetime, whether the Will was proved or not, was immaterial, and that after six years from the last acknowledgment the Statute of Limitations is a bar to a simple contract debt of a testator, although there has been no legal personal representative to sue: *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71. And it would seem that if the remedy of a creditor against the personal estate is barred, while his remedy against the real estate has been kept alive, the real estate can be made liable, although there is no legal personal representative: *per* Jessel, M. R., *ibid.* p. 74. And in *Re Hollingshead*, 37 C. D. 651, it was decided that payment by a devisee for life on a simple contract debt of his testator is sufficient acknowledgment to keep the debt alive against all parties interested in remainder; the law in regard to payment of interest by a tenant for life on a simple contract debt standing on the same footing as that with respect to payment of interest on a specialty debt. See also *Roddam* v. *Morley*, 1 De G. & J. 1; *Coope* v. *Cresswell*, L. R. 2 Ch. 112, 126. An acknowledgment of a debt by one of several executors as executor within this section is sufficient to keep the debt alive as against the others, and on the death of the executor making the acknowledgment an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving executors: *Re Macdonald*, [1897] 2 Ch. 181. Although as a general rule an executor may pay a statute-barred debt without committing a *devastavit*, he may not pay such a debt after it has

recover, and for the other defendant or defendants against the plaintiff."

With regard to the payment of principal or interest, it was held, that a payment by one of the makers of a joint and several promissory note took the case out of the statute, in the same manner as before the statute 9 Geo. IV (*i*).

effect of a payment by a co-contractor:

But now by the 14th section of the stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856), "where there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the [Statutes of Limitations], or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors or administrators" (*k*).

Stat. 19 & 20 Vict. c. 97.

been declared to be so barred by a Court of competent jurisdiction: *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

(*i*) By Parke, J., in *Chippendale* v. *Thurston*, Mood. & M. 411; *Wyatt* v. *Hodson*, 8 Bing. 309. This was by reason of the proviso that the Act shall not lessen the effect of any payment, &c. See also *Burleigh* v. *Stott*, 8 B. & C. 36; *Channel* v. *Ditchburn*, 5 M. & W. 494; *Goddard* v. *Ingram*, 3 Q. B. 839. But an acknowledgment by one only of two joint mortgagees does not entitle the mortgagor to redeem where the mortgagees have been in possession for more than twenty (now twelve) years: *Richardson* v. *Younge*, L. R. 10 Eq. 275; L. R. 6 Ch. 478.

(*k*) This section was held to be not retrospective: *Jackson* v. *Woolley*, 8 E. & B. 778, 784. "The Mercantile Law Amendment Act, 1856, dealt with part payment of principal and payment of interest, but only with regard to contractors and executors and administrators. The short effect of the enactment as to executors is that no executor shall 'lose the benefit of' the statute of James, 'so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other executor.' . . . . It was said that the payment of interest by one executor affected him only, and did not in any way affect his co-executor, and the argument was pushed to the extreme length of saying that the payment involved the executor who made it in a personal liability to pay the debt. Therefore it was urged that where one of two executors having assets in his hand applies those assets, so far as they extend, in payment of interest on a simple contract debt, the result is that, after the lapse of six years from the testator's death, not only is the co-executor absolved, but the testator's personal estate, whether in the hands of the co-executor or outstanding, is exempted from all liability to pay the debt, and that the creditor's sole remedy is against the executor personally who made the payment. This argument was founded on the language of the 14th section of the

But independently of this enactment where an action is brought against the executor of a deceased contractor, a payment by a surviving joint contractor, made *after the death of the testator*, will not take the case out of the Statute of Limitations: Thus, in *Atkins* v. *Tredgold* (*l*), A. and B. made a joint and several promissory note: A. died, and ten years after his death B. paid interest upon the note: In an action brought upon the note against the executor of A., it was held that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executors liable. Nor will it make any difference that the surviving joint contractor is the executor of the deceased: for it is clear that acts done by a surviving partner, who is executor of the deceased partner, and which the surviving partner was in that character bound to do, cannot *primâ facie* be considered to have been done in the character of executor (*m*). Again, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased to take the case out of the statute as against the survivor (*n*). Therefore, in *Slater* v. *Lawson* (*o*), it was holden, that after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party

Mercantile Law Amendment Act, but it appears to me that the full effect may be given to every word in that enactment without producing so extraordinary a result. Some reasonable interpretation may be put on the words 'so as to be chargeable' which would stop short of such a conclusion; as, for instance, by holding that the co-executor who has not paid is not to be personally chargeable as for a *devastavit* in paying over to beneficiaries assets which have come to his hands. But I dissent altogether from the proposition that the executor by whom the payment is made is thereby involved in any personal liability. The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor, that is, out of the personal assets of the testator. The inference or implication must be consistent with the facts from which it is drawn or raised, and it would be wholly inconsistent with the facts to hold that in such a case as that supposed the executor had incurred any personal liability": *per* Chitty, J., *Re Hollingshead*, 37 C. D. 651, 657. And see *per* Stirling, J., in *Re Macdonald*, [1897] 2 Ch. 181, at pp. 188, 189.

(*l*) 2 B. & C. 23.

(*m*) *Way* v. *Bassett*, 5 Hare, 55; *Brown* v. *Gordon*, 16 Beav. 302. But see *Braithwaite* v. *Britain*, 1 Keen, 206; *Griffin* v. *Ashley*, 2 C. & K. 139.

(*n*) 1 B. & Ad. 398.

(*o*) 1 B. & Ad. 396.

would not take the debt out of the Statute of Limitations as against the survivor.

In *Douglas* v. *Forrest* (*p*), an action was brought against an executor on a Scotch judgment recovered against his testator: The defendant after pleading the general issue, pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit: To this there was a replication, that the deceased, at the time the action accrued, was beyond seas, and remained there till he died, and that the plaintiff sued out his writ against the defendant within six years after he first took on himself the burthen and execution of the Will: and it was holden, that this replication was a good answer to the plea, the Court being of opinion, that although the injury of which the plaintiff complained had existed more than six years, yet he had no "cause of action," until there was some person within the realm against whom the action could be brought; and that, as the deceased never was in England after the cause of action accrued against him, there was no person in England against whom the plaintiff could proceed, until the defendant took upon him the execution of the Will (*q*).

(*p*) 4 Bing. 686.

(*q*) See also *Story* v. *Fry*, 1 Y. & C. C. C. 603; accord. It must be observed that it seems to have been the better opinion that even before the statute of Anne the exception in the statute 21 Jac. I. c. 16, in favour of persons being beyond sea, extended only to the case where the *creditors* or *plaintiffs* were so absent, and not where the *debtors* or *defendants* were; because only *creditors* are mentioned in the statute: *Hall* v. *Wyborn*, 1 Show. 99; 2 Saund. 121, *b*, note (4). And now by the statute 4 Anne, c. 16, s. 19, it is enacted that if any person *against whom* any action lies for seamen's wages, trespass, detinue, trover, replevin, action of account, or upon the case (or other actions mentioned in 21 Jac. I. c. 16, s. 3), was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the same time after his return as is limited for such action by the statute of 21 Jac. 1, c. 16, and 4 Anne, c. 16. The latter statute, however, does not appear to have been relied on either by the counsel or Court, in the above case of *Douglas* v. *Forrest*. But the decision is stated by Lord Denman in delivering the judgment of the Court of Exchequer Chamber in *Rhodes* v. *Smethurst*, 6 M. & W. 353, to have proceeded on the equity of that statute. See further, as to the construction of the statute of Anne, *Towns* v. *Mead*, 16 C. B. 123. Absence beyond seas of the plaintiff or one of the plaintiffs is no longer a disability, and the period of limitation will run as to joint debtors within the jurisdiction, though some be without it:

Death of debtor after cause of action accrued is no answer to a plea of the statute.

But it is no answer to a plea of the Statute of Limitations that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his Will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted: For, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued, from that time the date of six years begins to run; and when the statute once begins to run, it must continue to run (*r*).

Title to land once extinguished cannot be revived by acknowledgment.

Where a title to land has under sect. 34 of 3 & 4 Will. IV. c. 27, become extinguished it cannot be revived by acknowledgment. For instance, where a tenant in common had gained an adverse title under the statute to another share of the property, it was held that no payment of rent or acknowledgment by him could restore the title so extinguished (*s*). The statute 21 Jac. I. c. 16, differs in this respect, since it merely bars the remedy and does not extinguish the right.

Writ remains in force twelve months, but may with leave be renewed.

A writ of summons remains in force under R. S. C. 1883, Ord. VIII. r. 1, for twelve months, and may with leave be renewed from time to time for six months, and when so renewed will prevent the cause of action being barred under the Statute of Limitations from the date of the issuing of the original writ; but where a writ was issued in the Common Pleas against an administrator for a debt not then barred by statute, but was

19 & 20 Vict. c. 97, ss. 10, 11. See *ante*, p. 1529. Sect. 10 is not retrospective: *Pardo* v. *Bingham*, L. R. 4 Ch. 735.

(*r*) *Rhodes* v. *Smethurst*. 4 M. & W. 42, affirmed in the Exchequer Chamber, 6 M. & W. 351; *Freake* v. *Cranefeldt*, 3 M. & Cr. 499. As to the remedy of a creditor where there is no personal representative, see *Webster* v. *Webster*, 10 Ves. 93; and *Re Lovett*, 3 C. D. 198, and the cases there cited, as to whether a legal representative of a testator is a necessary party to an administration suit where an executor *de son tort* and trustees of the real estate are before the Court. It appears to be clear that where the object of the action is a general administration of the estate, a general personal representative is necessary (see *Rowsell* v. *Morris*, L. R. 17 Eq. 20; *Dowdswell* v. *Dowdswell*, 9 C. D. 294; Dan. Ch. Pr. 7th edit. p. 176), although R. S. C. 1883, Ord. XVI. r. 46, now provides that the Court may, in a proper case, appoint a person to represent the estate, or proceed in the absence of a representative. See further, as to the position of an administrator *pendente lite* of the personal estate of the deceased, appointed under sect. 70 of the Probate Act, 1857, *Re Toleman*, [1897] 1 Ch. 866.

(*s*) *Sanders* v. *Sanders*, 19 C. D. 373.

never served, and within six months after the issuing of the writ (at which time the debt was barred unless saved by the writ), the creditor took out an administration summons, Malins, V.-C., held, under the corresponding section (sect. 11) of the Common Law Procedure Act, 1862, that the writ only saved the bar for six months in the Court of Common Pleas, and that the statute was a bar to the administration suit (*t*).

Statute of Limitations may be pleaded by trustees.

By sect. 8 (*u*) of the Trustee Act, 1888 (51 & 52 Vict. c. 59), in which Act the term "trustee" shall be deemed to include an executor or administrator (*x*), provision is made for enabling trustees to plead the Statute of Limitations in certain cases.

Although, where the plaintiff died, a writ by journeys accounts could not be brought by his executor (*y*), yet if a *defendant* died, the plaintiff might pursue this writ against the personal representative, provided the action was of a nature such as would survive against an executor or administrator (*z*): and in such case, if the defendant pleaded the Statute of Limitations, the plaintiff might reply a writ newly brought by journeys accounts (*a*); and the executor of an executor must have pleaded that he had fully administered on the day of the first writ purchased (*b*). So if the plaintiff commenced an action against the deceased within six years of the accruing of the cause of action, and such action abated by his death, a reasonable time was allowed to the executor for bringing a fresh action either according to the principle of the old writ by journeys accounts, or according to an equitable construction of the 4th section of the statute (*c*). A year has been said to be a reasonable time, but the executor, if he use due diligence, is not bound to bring the action within a year from the death of the deceased, *e.g.*, if the defendant has made it impossible to do so by delaying to take out administration (*d*).

(*t*) *Manby* v. *Manby*, 3 C. D. 101.

(*u*) This section will be found fully set out and dealt with, *post*, p. 1661.

(*x*) Sect. 1, sub-sect. 3.

(*y*) See *ante*, p. 1525, note (*o*), for an account of this writ.

(*z*) *Kinsey* v. *Heyward*, 1 Lord Raym. 432. But there is some conflict between the authorities on this point. See the judgment of Lord Lyndhurst, in *Davies* v. *Lowndes*, 6 M. & Gr. 534; 1 Phil. Ch. C. 340.

(*a*) *Kinsey* v. *Heyward*, 1 Raym. 432; Com. Dig. Abatement (P.).

(*b*) *Spencer's Case*, 6 Co. 10, *b*; Doct. Plac. Exors. 2, p. 170, edit. 1677.

(*c*) See *ante*, pp. 1526, 1527.

(*d*) *Curlewis* v. *Lord Mornington*, 7 E. & B. 283; *S. C.*, in error, 27 L. J. Q. B. 489.

The same equitable construction has been applied to the limitation of actions on bonds, &c., imposed by the statute 3 & 4 Wm. IV. c. 42, s. 3 (*e*).

Notwithstanding the fact that actions no longer abate by death (*f*) it is still open to a plaintiff where the defendant dies to bring a new action against the executors within a year from probate and thus to take the case out of the Statute of Limitations. Thus in *Swindell* v. *Bulkeley* (*g*), a writ was issued, but before service the defendant died. Within a year from probate of the Will a fresh writ was issued against the executors for the same cause of action, but in the meantime the six years had expired. It was held that the old procedure was still available, and that the Statute of Limitations afforded no defence to the action. An alternative procedure is to apply under R. S. C. 1883, Ord. XVII. r. 2, to add the executors as parties (*h*).

Plea of set-off:

A defendant sued as executor or administrator, cannot set off a debt due to himself personally (*i*), nor, if sued for his own debt, can he set off what is due to him as executor or administrator (*k*): because the debts sued for and intended to be set off must be mutual, and due in the same right (*l*). But it has been held that to a declaration in debt or assumpsit against an executor, on an account stated by him *as executor*, a set-off for debts due from the plaintiff to the testator may well be pleaded; for that an account stated by an executor as such must be taken to show a debt due from his testator to the plaintiff (*m*).

(*e*) *Sturgis* v. *Darell*, 4 H. & N. 622; *S. C.*, in error, 6 H. & N. 120.

(*f*) R. S. C. 1883, Ord. XVII. r. 1, repeating the similar provision in the Common Law Procedure Act, 1852.

(*g*) 18 Q. B. D. 250.

(*h*) See also r. 4 of the same Order, which provides for carrying on the proceedings between the continuing parties and the new parties.

(*i*) *Re Dickinson*, W. N. (1888), 94; *Phillips* v. *Howell*, [1901] 2 Ch. 773.

(*k*) *Nelson* v. *Roberts*, 69 L. T. 352.

(*l*) *Bishop* v. *Church*, 3 Atk. 691; *Gale* v. *Luttrell*, 1 Y. & Jerv. 180; cf. *Bailey* v. *Finch*, L. R. 7 Q. B. 34, discussed *ante*, p. 1522, and Ann. Prac. 1904, p. 281; *Ex parte Morier*, 12 C. D. 491. Set-off is now governed by R. S. C. 1883, Ord. XIX. r. 3, as to which, and as to set-off against an executor, see *ante*, p. 1519 *et seq.* An administrator is entitled to set off against the share of one of the next of kin the whole of a debt due from him to the intestate's estate, part of which debt has become barred by the Statute of Limitations: *Re Cordwell's Estate*, L. R. 20 Eq. 644.

(*m*) *Blakesley* v. *Smallwood*, 8

plea of *plene administravit*:

If the executor or administrator has not assets to satisfy the debt, upon which an action is brought against him, he must take care to plead *plene administravit* or *plene administravit præter*, &c. (*n*). For it was said prior to the Judicature Acts that a judgment against an executor or administrator, whether by default or on demurrer (*o*), or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *riens ultra* (*p*), was conclusive upon him that he had assets to satisfy such judgment (*q*). But that if the executor pleaded either a general or special *plene administravit*, he was liable only to the amount of assets proved to be in his hands; and a judgment against an executor, on a verdict upon *plene administravit*, was only an admission of assets to the extent of assets proved to be in his hands (*r*). And the substance of these propositions would still seem to be true, as showing the onus of pleading even under the Judicature Acts.

The essential part of the plea of *plene administravit* was, that "the said defendant has no goods, which were of the said A. B. (the testator), at the time of his death in the hands of the said defendant, as executor, to be administered, *or had, at the time of the commencement of the suit, or ever since*": and the omission of any of the above averments was always held fatal on demurrer, as well in a general as a special *plene administravit*.

Q. B. 538. But it may be argued that the debt, *on which the action is founded*, is the debt which arises, after the death of the testator, on the account stated between the executor and the plaintiff; and that, therefore, in truth, this case, as well as *Mardall* v. *Thellusson*, 18 Q. B. 857, 6 E. & B. 976, was overruled by *Rees* v. *Watts*, 11 Exch. 410, and *Newell* v. *Nat. Prov. Bank of England*, 1 C. P. D. 496, *ante*, p. 1519, note (*m*). See also *Re Gregson*, 36 C. D. 223. In *Mardall* v. *Thellusson*, the defendants were sued as executors for a debt which accrued due from their testator in his lifetime, and it was held that they might set off a debt which had accrued due from the plaintiff to them as executors since the death of their testator.

(*n*) For forms of these pleadings, see Bullen & Leake, 5th edit. p. 697 *et seq.*

(*o*) *Rock* v. *Leighton*, 1 Salk. 310; S. P. admitted 3 T. R. 686; *Leonard* v. *Simpson*, 2 Bing. N. C. 176.

(*p*) *Ramsden* v. *Jackson*, 1 Atk. 292; *Erving* v. *Peters*, 3 T. R. 685.

(*q*) 1 Saund. 219, *b*, note to *Wheatley* v. *Lane*.

(*r*) 1 Saund. 219, *b*, note. *Cousins* v. *Paddon*, 2 Cr. M. & R. 558, *per* Parke, B.; *Re Higgins' Trusts*, 2 Giff. 562.

Under the old pleading rules there was a great deal of discussion (*s*) as to whether the words "*or ever since*" were essential to the plea of *plene administravit*, and whether the judgment of assets *quando acciderint* would embrace assets received between writ and judgment, and it seems ultimately to have been decided that the words were not essential, and that the judgment of assets *quando acciderint* embraced all assets received after writ. All this seems immaterial since the Judicature Acts, except in so far as it shows, on the one hand, that if a defendant executor wishes to rely upon a payment of a creditor, since writ issued, as a *pro tanto* discharge under the rule in equity, he would have to specifically allege the fact in his defence, as was done in *Vibart* v. *Coles* (*t*), and not rely on a general statement that the defendant had fully administered the estate, and that there were no assets for the payment of the plaintiff's debt: and, on the other hand, that if a plaintiff wishes to rely on the receipt of assets after writ, he should allege such receipt in his reply to the defence of *plene administravit* (*u*). The importance of these matters is, however, largely diminished by the power of amendment under the Judicature Act, but these amendments sometimes involve adjournment and payment of costs.

Again, in an action brought against the executor of an executor, it was not sufficient to plead that the defendant had not any goods or chattels of the original testator in his hands to be administered; but he must also plead, either that the first executor fully administered, or that he the said defendant had no assets of the first executor out of which he could satisfy any *devastavit* committed by the first executor (*x*). And such matters would seem to be essential to the substance of the defence.

plene administravit præter.

Again, an executor was *bound* to plead a debt of a higher nature, of which he had notice, in bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he had not assets for both: otherwise it would be an admission of assets to satisfy both debts (*y*). Thus the executor was bound to plead a judgment recovered against the testator, in bar of an action on a bond; otherwise he would admit that he had assets to satisfy the judgment (*z*).

(*s*) See Wms. Exors. 8th edit. pp. 1964, 1992.

(*t*) 24 Q. B. D. 364.

(*u*) See *post*, p. 1586, note (*y*).

(*x*) *Wells* v. *Fydell*, 10 East, 315.

(*y*) *Rock* v. *Leighton*, 1 Salk. 310; *Ante*, p. 780.

(*z*) *Earle* v. *Hinton*, 2 Stra. 732.

It will be remembered that since Hinde Palmer's Act (32 & 33 Vict. c. 46), specialty debts have not, in the administration of the estate of any person dying on or after January 1st, 1870, any priority over simple contract debts, but a plea or defence such as that in the text will still be necessary in some cases, *e.g.*, in the case of an outstanding judgment (*a*).

If the judgment pleaded was recovered against the testator and another, the plea had to aver the survivorship of the testator (*b*).

An unregistered judgment obtained against the executor himself before administration decree has priority over all debts of equal degree, and under 32 & 33 Vict. c. 46, specialty and simple contract debts are of the same degree (*c*). But now by sect. 10 of the Judicature Act, 1875, as to persons dying after the 1st November, 1875, the rule in bankruptcy that all debts are to be paid *pari passu* applies in the administration by the Court of an insolvent estate in Chancery (*d*).

A recovery against one of several executors or administrators, and no assets *ultra*, may be pleaded in an action against all the executors or administrators for another debt of the testator or intestate (*e*).

It may be observed, that a plea of judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not with an *ulterius manutenere non debet*, even where the judgment has been confessed after action brought, and pleaded *puis darrein continuance;* contrary, apparently, to the general rule, that a matter of defence, arising after action brought, cannot be properly pleaded in bar of the action generally, but must be pleaded in bar of the further maintenance of the suit (*f*). But this arises from the peculiar nature of the action, which is brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets, supposed to be in his, the executor's,

(*a*) See *ante*, Pt. III. Bk. II. Ch. II. § III. p. 771. And note that an unregistered judgment ranks only as a simple contract debt: *Van Gheluive* v. *Nerinckx*, 21 C. D. 189; *ante*, p. 765.

(*b*) *Trethewy* v. *Ackland*, 2 Saund. 50.

(*c*) *Re Williams' Estate*, L. R. 15 Eq. 270; *Re Stubbs' Estate*, 8 C. D. 154.

(*d*) *Re Whitaker*, [1901] 1 Ch. 9, disapproving *Re Maggi*, 20 C. D. 545. See *ante*, p. 759.

(*e*) *Further* v. *Further*, Cro. Eliz. 471.

(*f*) *Le Bret* v. *Papillon*, 4 East, 502.

hands, liable to its satisfaction; and the executor has by law a power of confessing a judgment to another creditor in preference to the plaintiff, in the suit first brought, and thereby, to the extent of the assets then in hand, to create a perpetual bar to the plaintiff's suit, the same being pleaded in the usual way, *viz.*, that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and constantly does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands, after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor, pending the writ, enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets (*g*).

(*g*) *Le Bret* v. *Papillon*, 4 East, 508. Matters arising pending action may be pleaded by way of defence under the provisions of R. S. C. 1883, Ord. XXIV., and inasmuch as an executor or administrator may prefer one creditor to another, the payment of one creditor, after an action has been commenced by another, may be set up in answer to such action. Thus in *Vibart* v. *Coles*, 24 Q. B. D. 364, following *Re Radcliffe*, 7 C. D. 733, the defendant, an administratrix, after action brought against her for money lent to the intestate by the plaintiff, consented to a Judge's order for judgment in a subsequent action by another creditor for a debt due from the intestate, and, judgment being signed accordingly, she paid the amount of the debt, and thereby exhausted the assets, and it was held that she was entitled to make such payment, and thereby defeat the plaintiff.

There was formerly a conflict between the rules of common law and equity on this point, the common law holding that an executor or administrator, though he could confess judgment, could not, and equity that he could, pay one creditor before another; but since the Judicature Act, 1873, s. 25, sub-s. 11, the equity rule prevails: *ibid.* Whether or not such a defence requires to be pleaded as a matter arising after action brought or after the expiry of the time limited for defence under Ord. XXIV., does not seem ever to have been decided. If it is necessary so to plead it, and the defendant cannot merely give in evidence under a plea of *plene administravit* the fact that since action brought he has paid a creditor other than the plaintiff, and thus exhausted the assets, the plaintiff, according to the words of the rule, would be entitled to confess the defence and sign judgment for his costs, unless he elected to take a judgment of assets *quando acciderint*.

The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased, have been investigated in a previous part of this Treatise (*h*). It was held to be optional in the executor or administrator either to *plead* a retainer for such a debt, or to give it *in evidence* under a plea of *plene administravit* (*i*). So he might either plead, or show in evidence under that plea, that he retained assets to a certain amount, for the expenses of the funeral (*k*), or of taking out administration (*l*), or to reimburse himself for payments made out of his own pocket, in discharge of debts not inferior in their kind to the debt of the plaintiff before the commencement of the suit (*m*). But a retainer for unsatisfied debts of the testator or intestate, of a higher degree than that on which the action is brought, must be pleaded (*n*).

Plea of retainer: for debt due from testator to executor; for disbursements by executor; for debts outstanding.

Where an executor pleaded that he had no assets *ultra* a judgment, which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff might reply, that the judgment was had and obtained by fraud and covin between the executor and the creditor (*o*). But the plaintiff could not traverse the averment that the debt, for which the judgment was had, was a just and true debt (*p*).

Replication to a plea of *plene administravit præter.*

So the plaintiff might reply that the judgment is kept on foot by covin to defraud the creditors, viz., "that the said defendant defers procuring acknowledgment of satisfaction to be entered of the said debt and damages, so recovered, &c. with intent to defraud him the said plaintiff:" As where the executor com-

(*h*) *Ante*, p. 785 *et seq.*

(*i*) 1 Saund. 333, note (6). Having regard to the terms of R. S. C. 1883, Ord. XIX. r. 4, it would seem prudent in every case to allege the facts upon which any retainer, which it is sought to set up, is based.

(*k*) See *R.* v. *Wade*, 5 Price, 621, as to the form of such a plea.

(*l*) *Gillies* v. *Smither*, 2 Stark. N. P. C. 528.

(*m*) Co. Lit. 283, *a.*; Bull. N. P. 140.

(*n*) Bull. N. P. 141. Since Hinde Palmer's Act (32 & 33 Vict. c. 46), specialty debts have no priority. See *ante*, pp. 771, 1585. But Hinde Palmer's Act has not enlarged the executor's right of retainer for a debt due from the testator to himself. See *ante*, p. 786.

(*o*) *Williams* v. *Fowler*, 1 Stra. 410; 2 Saund. 50, note (3).

(*p*) *Robinson* v. *Corbett*, 1 Lutw. 662, by Powell, J.; 2 Saund. 50, note (3). Indeed, it was not necessary for an executor who pleaded an outstanding judgment, to aver that the debt, upon which the judgment was obtained, was a just and true debt: 1 Saund. 329, note (3).

pounded for a less sum and did not procure the judgment to be discharged, but pleaded it to an action brought against him by another creditor, he might reply the composition, and that the judgment was kept on foot by covin: for nothing shall be allowed to the executor but what he actually pays (*q*).

The executor, in his rejoinder to replications of this description, was bound to traverse the fraud. And the plaintiff might, upon this issue, give in evidence, either that the debt was not a just one, or that less was due than the sum for which judgment had been given (*r*).

In answer to the latter evidence, which is *primâ facie* proof of fraud, the defendant might show that the judgment was entered for more than was due, by mistake (*s*). If a judgment was pleaded, and *per fraudem* replied, upon which issue was taken, and it appeared in evidence that the creditor was willing to take less than was recovered, it was proof of fraud; but if it were shown that the administrator had not assets to pay that sum, it was no fraud (*t*). It should be observed, that where a judgment was obtained against an executor by covin, but for a just debt, the creditor could not avoid the judgment by alleging that it was obtained by covin to defraud him (*u*).

Evidence for plaintiff upon issue joined on plea of *plene administravit*.

If an executor or administrator pleads *plene administravit* and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burthen of proof lies upon the plaintiff, who must prove that assets existed, or ought to have existed, in the hands of the defendant at the time of the writ sued out (*x*). The question, as to what shall be considered assets come to the hands of the executor or administrator, has been already discussed (*y*).

(*q*) 1 Saund. 334, note (9).

(*r*) 2 Saund. 50, note (3).

(*s*) *Pease* v. *Naylor*, 5 T. R. 80.

(*t*) *Per curiam*, in *Parker* v. *Atfield*, 1 Salk. 312.

(*u*) *Veale* v. *Gatesdon*, W. Jones. 92, 3rd Resolution; *Williams* v. *Fowler*, 1 Stra. 410; 1 Saund. 334, note (9).

(*x*) *Mara* v. *Quin*, 6 T. R. 10; *Webster* v. *Blackman*, 2 Fost. & F. 490.

(*y*) *Ante*, p. 1290 *et seq.* In *Britton* v. *Jones*, 3 Bing. N. C. 676, upon a plea of *plene administravit* and replication of assets in hand at the time of the commencement of the suit, it appeared at the trial, that the testator, twelve months before his decease, purchased twelve mahogany chairs, which were seen in the house where he lived shortly before his death: The defendant proved that the deceased died poor, that he lodged in the same house with his mother and his sister, the

The plaintiff could not have proved, under this issue, that assets have been received subsequently to the commencement of the suit; to be admitted to such proof, he should have replied this matter specially (*z*).

If, upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit* (*a*).

Proof of assets by production of inventory.

In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the Court of Probate: And after the inventory is put in, it is for the defendant to discharge himself of the items (*b*).

In *Shelly's Case* (*c*), Lord Holt said, that all sperate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved. Again, in *Smith* v. *Davies* (*d*), Lord Hardwicke held, that if in the inventory produced the article concerning debts does not distinguish between sperate and desperate, it will be sufficient to charge the executor with the whole *primâ facie* as assets, and put upon him to prove any of them desperate; as if the article were, "Item, for debts due and owing, which I admit myself to be charged with when recovered or received" (*e*). And the authority of these cases appears to have been recognised and acted upon in the Common Pleas, in a case in the time of

defendant; and that money was borrowed to bury him: It was contended that, as it had not been proved that the furniture in question ever came to the hands of the defendant, there was no evidence to charge her with it as assets; but the Court of C. P. held that there was a *primâ facie* case for that purpose. See also *Stroud* v. *Dandridge*, 1 Car. & K. 445.

(*z*) *Mara* v. *Quin*, 6 T. R. 11; 2 Phill. Ev. 347, 6th edit.; Roscoe, Nisi Prius Evidence, 16th edit., 1218.

(*a*) Wentw. Off. Ex. c. 13, p. 312, 14th edit. This finding by the jury of assets in the hands of the executor is not against truth, though they be wasted, and so not to be had in kind; for the executor had them in right, since he has not rightfully parted from them; according to the rule, *pro possessore habetur qui dolo aut injuriâ desiit possidere: Ibid.* See *Reeves* v. *Ward*, 2 Bing. N. C. 235; *S. C.*, 2 Scott, 296.

(*b*) *Giles* v. *Dyson*, 1 Stark. N. P. C. 32.

(*c*) 1 Salk. 296.

(*d*) Bull. N. P. 140; *S. C.*, Selwyn's N. P. 779, note, 6th edit.

(*e*) The defendant proved, by a witness, who went to demand several of them, that he could not recover them, and accordingly they were allowed as desperate: Selw. *ubi supra*.

Dallas, C. J. (*f*). But in *Gyles* v. *Dyson* (*g*), where on the trial of an issue joined on a plea of *plene administravit*, it was contended, on the authority of *Smith* v. *Davies*, that certain debts which the defendant had, in an inventory exhibited in the Ecclesiastical Court, allowed to be due to the estate and which he did not represent to be desperate, were to be considered as actual assets in his hands, Lord Ellenborough said, "You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a number of other circumstances; but upon the plea of *plene administravit*, it is necessary to prove that effects came into the hands of the defendant; this is the universal practice (*h*).

Inventory only *primâ facie* evidence.

The inventory would seem to be only *primâ facie* evidence, and it may be doubtful whether an inventory made or exhibited by one executor or administrator would be even *primâ facie* evidence against another (*i*).

Amount of probate stamp admissible in evidence.

The amount of the probate stamp is *admissible* in evidence, on the issue joined on a plea of *plene administravit* (*k*). And the Court of King's Bench, in *Foster* v. *Blakelock* (*l*), held that the probate stamp was *primâ facie* evidence that the executor had assets to the amount covered by the stamp (*m*). But this decision, it would seem, must now be considered as overruled. In the case of *Stearn* v. *Mills* (*n*), Littledale, J., and Parke, J., expressed their dissent from it: And in the subsequent case of *Mann* v. *Lang* (*o*), Littledale, J., said, that he could not say that the stamp on the probate was not admissible; but it was not *primâ facie* evidence of the amount of assets: In the same case Lord Denman expressed his opinion, that if there be evidence of a long acquiescence by the executor, without re-demanding any of the duty, it is *primâ facie* evidence of such amount; though it is not of itself evidence of such amount: But

(*f*) *Young* v. *Cawdrey*, 8 Taunt. 734; *S. C.*, *nomine Young* v. *Cordery*, 3 B. Moore, 69.

(*g*) 1 Stark. N. P. C. 32.

(*h*) See *ante*, p. 1292.

(*i*) *Stearn* v. *Mills*, 4 B. & Ad. 657. The same would probably be true of the account of the personal estate to be delivered pursuant to 43 Vict. c. 14, s. 10, and of the accounts which are annexed to the Inland Revenue affidavit, pursuant to sect. 8 (3) of the Finance Act, 1894 (57 & 58 Vict. c. 30).

(*k*) *Mann* v. *Lang*, 3 Ad. & E. 699.

(*l*) 5 B. & C. 328.

(*m*) See also *Curtis* v. *Hunt*, 1 C. & P. 180, where Lord Tenterden ruled to the same effect.

(*n*) 4 B. & Ad. 657.

(*o*) 3 Ad. & E. 699.

Paterson, J., was of opinion, that it is not such *primâ facie* evidence, even if a long acquiescence is shown. This subject was again considered in the Court of Chancery, in the case of *Lazonby* v. *Rawson* (*p*), where Lord Cranworth, C., in giving judgment, said, "The circumstance of an executor having paid probate duty up to a particular amount, may be *primâ facie* evidence of his having thought that the testator had died possessed of property represented by the amount of the stamp duty paid: But the probate duty is, in the first instance, payable on the whole of the personal estate left by the testator: If it cannot all be got in, and it should be ascertained that it was not of the value represented, in such a case provision is made for enabling the executor to get a return of the amount overpaid: Where, therefore, an executor has not made any application for the return of the duty which he may have paid in excess, it is a step in evidence towards proving an admission of assets to the amount, though by no means conclusive evidence that the executor had made a correct estimate of the testator's property. Much might depend on the amount overpaid, and the pecuniary condition in life of the executor, whether he would be at the trouble of getting a return of the excess of duty overpaid. Here the executor paid 40*l.* in respect of probate duty, and never got back any of it, and I think it certainly amounts to strong presumptive evidence that he had received assets to the extent covered by that amount of duty; but it is not an absolute admission that he did."

An admission by the defendant, that a debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets: for such an admission must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit*, by paying this debt before others of a higher nature (*q*). But if an executor compound with the creditors, and afterwards, at the suit of any of them, plead *plene administravit*, proof of the composition would be conclusive proof of assets, and the Court would not suffer him to give evidence of no assets (*r*). However, an executor

Compounding with creditors is an admission of assets to pay the composition.

(*p*) 4 De G. M. & G. 556.

(*q*) *Hindsley* v. *Russell*, 12 East, 235; 2 Phillim. Ev. 348, 6th edit. If the executor refers a party to a third person for information respecting the effects of the testator, it would seem that an admission of assets by such third person will bind the executor: *Williams* v. *Innes*, 1 Camp. 364.

(*r*) Bull. N. P. 145.

will not admit assets by paying interest on a bond due from the testator (*s*): for it would be unreasonable that he should be liable for the whole debt, by paying a part out of his own funds, or that, because he has enough in his hands to pay the interest, he should be thereby concluded from disputing assets for the principal (*t*).

Evidence for executor that the assets have been exhausted.

In answer to the proof of assets, the executor or administrator may show under the issue joined on *plene administravit* (*u*), that he has exhausted the assets, by discharging other demands on the estate, not inferior in their nature to that of the plaintiff (*x*), or even by the payment of debts of inferior degree, without notice of the plaintiff's demand (*y*). Again, the executor may show that he has disbursed the assets in the expenses of the funeral, or of probate (*z*), or administration, or, as it should seem, in the reasonable charges of collecting the debts of the deceased (*a*). So he may show that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable, without proving that he has paid them (*b*).

Where the executor shows payments made by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may show, in answer, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets first proved to have come to his hands (*c*).

(*s*) *Cleverley* v. *Brett*, cited by Buller, J., 5 T. R. 8; 2 Phillim. Ev. 348, 6th ed.

(*t*) See further as to what is an admission of assets, *post*, p. 1628.

(*u*) *Reeves* v. *Ward*, 2 Bing. N. C. 235.

(*x*) See *ante*, p. 779 *et seq.*

(*y*) *The Governors of Chelsea Waterworks* v. *Cowper*, 1 Esp. N. P. C. 277; *ante*, p. 780. But according to the judgment of Lawrence, J., in *Hickey* v. *Hayter*, 6 T. R. 388, these payments without notice must be pleaded.

(*z*) It is a question for the jury whether the executor has committed a *devastavit* by swearing the property above its value without reasonable ground, and so incurring a greater stamp duty than was requisite, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property: *Jackson* v. *Bowley*, Carr. & M. 97.

(*a*) *Giles* v. *Dyson*, 1 Stark. N. P. C. 32. But he cannot be allowed for disbursements in the schooling, feeding, and clothing of the children of the testator, subsequently to his decease: *Ibid.*

(*b*) See *ante*, p. 1587; *Gillies* v. *Smither*, 2 Stark. N. P. C. 528.

(*c*) *Marston* v. *Downes*, 1 A. & E. 31.

The defendant could not, under a plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature; such defence must have been pleaded (*d*), and probably now also must be pleaded.

Again, the defendant could not show, in answer to proof of assets, that he had applied them in the payment of debts since the commencement of the suit; for under *plene administravit*, no payments, made after the action commenced, could be given in evidence (*e*). If, therefore, the executor had paid other creditors of superior degree after action commenced, he must have pleaded that matter specially, and if he has paid other creditors of equal degree, since the writ issued, he ought, it would seem, to plead the fact specifically (*f*).

It would seem (as there has already been occasion to point out) (*g*), that if, in the distribution of assets, a creditor misleads an executor, either by laches or express authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*h*). So where a party entitled to a legacy under a Will has a claim against the testator, which he conceals from the executors till after he has received his legacy, he cannot

(*d*) Bull. N. P. 141; 1 Saund. 333, *a*, note (8); *ante*, p. 780.

(*e*) Dyer, 32, *a*, *in margine;* Com. Dig. Admon. C. (2); *Nightingale* v. *Lee*, 1 Freem. 110.

(*f*) R. S. C. 1883, Ord. XIX. r. 4.

(*g*) *Ante*, p. 1082.

(*h*) *Richards* v. *Browne*, 3 Bing. N. C. 499, by Tindal, C. J.; *ante*, p. 1082. It was held in *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56, that a defence of this character could be properly pleaded under a plea *of plene administravit:* probably now it would have to be specifically pleaded under R. S. C. 1883, Ord. XIX. r. 4. A creditor does not lose his right to sue the executors by mere laches. But if the creditor misleads the executors, so that they are thereby induced to part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit*. Although C. J. Tindal uses the word "laches," he does not mean that mere doing nothing will deprive the creditor of his remedy; he means "conduct:" *per* Chitty, J., *Re Birch*, 27 C. D. 622. There is no rule in equity any more than in law that the mere non-suing by any specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. And therefore if an executor disposes of the estate of the testator without providing for a liability of the testator under a covenant, he will be liable for the amount as upon a *devastavit*, even after the lapse of eighteen years: *Re Baker*, 20 C. D. 230. See also *ante*, p. 1082.

afterwards, in an action against the executors, object that the amount of the legacy was not paid in a due course of administration (*i*).

Judgment against an executor:

Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him must be, that the plaintiff do recover the debt and costs to be levied *out of the assets of the testator*, if the defendant have so much; but if not, then *the costs* out of the defendant's *own goods* (*k*). So where the executor pleads *plene administravit*, and it is found against him, the judgment is *de bonis testatoris, et si non, &c.*, then the costs *de bonis propriis* (*l*).

It was formerly held that where the defendant pleaded *ne unques executor* or *administrator*, or a release *to himself*, and it was found against him, the judgment was, that the plaintiff do recover both *the debts and costs*, in the first place, *de bonis testatoris, si, &c.*, and *si non, &c., de bonis propriis* (*m*). The reason alleged was, because the executor could not but know these to be false pleas: But the same reason seems equally to apply to other pleas where the judgment was different (*n*). And this probably would be held no longer to be law, especially as the rule was rather a pleading result, deduced from pleading admissions, which the Court would not let the defendant remedy by amendment, than a punishment inflicted by the Court, which had indeed no jurisdiction to inflict such a punishment.

for what amount judgment shall be

With respect to the *amount* for which judgment should be entered against the executor upon a plea of *plene administravit*,

(*i*) *Stroud* v. *Stroud*, 7 M. & Gr. 417.

(*k*) 1 Saund. 335, note (10), to *Hancock* v. *Prowd*; *Gorton* v. *Gregory*, 3 B. & S. 90. The Court refused, after a lapse of six years, to allow a judgment for the debt *de bonis testatoris*, and for the costs *de bonis testatoris et si non de bonis propriis*, to be altered to a judgment generally *de bonis testatoris et si non de bonis propriis*, even if the latter were clearly the judgment to which the plaintiff was entitled: the distinction being between an alteration to *discharge*, and one to *fix*, the personal liability of the executor: *Burroughs* v. *Stevens*, 5 Taunt. 556.

(*l*) 1 Roll. Abr. 931 (D.), pl. 3; Wentw. Off. Ex. 344, 14th edit.

(*m*) Bro. Exors. 34; 1 Roll. Abr. p. 930 (C.), pl. 2, 8, p. 933, pl. 15; *Bull* v. *Wheeler*, Cro. Jac. 648; Wentw. Off. Ex. 338, 340, 14th edit.; 1 Saund. 336, *b*, note (10); *Hooper* v. *Summersett*, Wightw. 20, *per curiam*.

(*n*) 1 Saund. 336, *b*, note (10).

upon a plea of *plene administravit:*

if the executor plead either a general or special *plene administravit*, he is liable only to the amount of the assets proved to be in his hands (*o*). Thus in *Harrison* v. *Beccles* (*p*), the plaintiff, having proved a debt of 80*l.*, took a verdict on the *non assumpsit* for the sum, and having proved 25*l.* assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando*, &c., for the residue (*q*).

(*o*) 1 Saund. 219, *b*, note to *Wheatley* v. *Lane; Jackson* v. *Lyon*, Carr. & M. 97.

(*p*) Cited 3 T. R. 688.

(*q*) *Hancock* v. *Podmore*, 1 B. & Ad. 265, *per* Bayley, J.; accord. The following form is taken from Serjt. Williams' note in Sir E. V. Williams' edition, 1 Wms. Saund. 608, 609, for entering up judgment on the two issues of *non assumpsit* by the testator and of *plene administravit* by the defendant, to which the plaintiff replied that the defendant had assets since the commencement of the suit, where the jury find the first issue for the plaintiff, and, on the second issue, that the defendant has assets to satisfy only *part* of the debt: "As to the first issue between the said parties within joined, [the jurors] upon their oath do say, that the within-named William Clarke (the testator) in his lifetime did undertake and promise in manner and form as the said Francis hath above thereof complained against her the said defendant Mary (the executrix), and they assess the damages of the said Francis by reason of the not performing of the said promises and undertakings, over and above his costs and charges by him about his suit in this behalf expended, to 80*l.*, and for those costs and charges to 40*s.* And as to the last issue between the said parties within joined, the jurors aforesaid upon their oath aforesaid say, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, and since had goods and chattels which were of the said William at the time of his death in her hands to be administered to the value of 40*l.*, parcel of the said damages above assessed, wherewith she the said Mary might have satisfied the said Francis 40*l.*, parcel of the said damages; and as to 40*l.* residue of the said damages, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, or ever since, had not any other goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, wherewith she could have satisfied the said Francis the said 40*l.*, residue of the said damages so assessed as aforesaid. Therefore it is considered that the said Francis do recover against the said Mary the said 40*l.* by the said jury in form aforesaid found, parcel of the said damages of 80*l.* above assessed, together with his costs and charges by the said jury in form aforesaid assessed, and also 35*l.* for his costs and charges of increase by the said Court of our said lord the King here adjudged to the said Francis with his assent, which said damages, costs, and charges, in the whole amount to 77*l.*, to be levied of the goods and chattels

judgment upon *plene administravit*, when one only of several executors is found to have assets:

When several executors plead *plene administravit severally* by several attorneys, and the jury find that one of them only has assets, judgment shall be given against him only and the rest shall go quit (*r*). So too in *Parsons* v. *Hancocke* (*s*), where in an action against several executors they all pleaded *jointly* that they had fully administered, &c., and the plaintiff proved assets in the hands of some only of the defendants, Parke, J., directed the jury to find a verdict for the plaintiff against the latter, and, as to the other executors, to find a verdict for the defendants (*t*).

executor's liability and right to costs as defendant:

It will appear, on referring to the description above given of the proper mode of entering judgment against executors and administrators (*u*), that, when defendants, they have no privilege as to costs; but, on the contrary, are liable to pay them *de bonis propriis* if there are no assets (*x*). The liability as well as the right to costs in the case of executors and administrators is governed, as in the case of ordinary litigants, by the provisions of R. S. C. 1883, Ord. LXV. (*y*).

judgment of assets *in futuro*:

In an action against an executor or administrator, if the defendant pleads *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment immediately of assets *quando acciderint*, or as it is sometimes called, judgment of assets *in futuro* (*z*). But if the plaintiff take issue on the general or special plea of *plene*

which were of the said William at the time of his death in the hands of the said Mary to be administered, if she hath so much in her hands to be administered, and if not, then the said costs and charges, parcel of the damages last mentioned, amounting to 37*l.*, to be levied of the proper goods and chattels of the said Mary, and that, &c., &c., and that the said Francis do recover the said 40*l.* residue of the said damages in form aforesaid assessed, to be levied of the goods and chattels which were of the said William at the time of his death, *or which since the pleading of the said second plea* of the said Mary, have come or at any time hereafter shall come, to the hands of the said Mary, to be administered. And the said Mary in mercy," &c.

(*r*) *Bellew* v. *Juckleden*, 1 Roll. Abr. 929 (B.), pl. 5.

(*s*) 1 Mood. & Malk. 330.

(*t*) See also the remarks of the same learned judge in *Cousins* v. *Paddon*, 2 Crompt. M. & R. 558.

(*u*) *Ante*, p. 1594.

(*x*) See *Marshall* v. *Willder*, 9 B. & C. 655, 658.

(*y*) See *ante*, pp. 1533, 1552.

(*z*) *Mary Shipley's Case*, 8 Co. 134, *a*; *Noell* v. *Nelson*, 2 Saund. 226; *Parker* v. *Dee*, 3 Swanst. 532, note to *Drewry* v. *Thacker*. See the form of such judgment, 1 Saund. 216, 217.

administravit, and it be found against him, he could not under the former practice have judgment of assets *quando*, &c. (*a*).

By taking judgment of assets *quando* the plaintiff admits that the defendant has fully administered to that time (*b*): And accordingly, the terms of the judgment are that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor. And in debt or *scire facias*, on this judgment proof of the executor's receiving assets was always at the trial confined to a period subsequent to the judgment (*c*). And it is right that such be the rule at law; for if a creditor was permitted to litigate a second time that which has been once settled between the parties, either by verdict or admission, an executor would be harassed and involved in infinite expense and litigation (*d*).

costs on judgment of assets *in futuro*.

When an executor or administrator pleads *plene administravit*, or judgments, &c., outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *quando*, &c., the executor or administrator is not liable to costs *de bonis propriis* (*e*): nor does he seem liable thereto, when he pleads *plene administravit præter*, and the plaintiff takes judgment of the assets admitted in part, and for the residue, of assets *quando*, &c. (*f*). But it would seem that though an executor or administrator, in such case, is not personally liable to pay costs, yet that judgment may be well entered for them, to be recovered *de bonis testatoris, quando acciderint* (*g*).

Proceedings on judgment against executor *de bonis testatoris;*

Formerly there were two modes of enforcing a judgment obtained against an executor *de bonis testatoris:* 1st, by *fieri facias* (*h*), or *scire fieri* inquiry; 2nd, by an action of debt on the judgment, suggesting a *devastavit*.

(*a*) 1 Roll. Abr. 929 (B.), pl. 2; 2 Saund. 217, note (1) to *Noell* v. *Nelson; Lucas* v. *Jenner*, 2 Dowl. 64, *per* Bayley, B. But see *Hindsley* v. *Russell*, 12 East, 232. The same consequence does not seem to follow where *plene administravit* is ill pleaded: *Harris* v. *Goodwyn*, 2 M. & Gr. 414, 415, *per* Tindal, C. J.

(*b*) 2 Saund. 219, note (2); *Parker* v. *Dee*, 3 Swanst. 532, note to *Drewry* v. *Thacker*.

(*c*) *Taylor* v. *Holman*, Bull. N. P. 169; 2 Saund. 219, *a*, note (2).

(*d*) *Mara* v. *Quin*, 6 T. R. 1; 2 Saund. 219, *a*, note (2).

(*e*) 1 Saund. 336, *b*, note; Tidd, 980, 9th edit.

(*f*) Tidd, 980, 9th edit.

(*g*) *De Tastet* v. *Andrade*, 1 Chitt. Rep. 629, 630, *in notis; Cox* v. *Peacock*, 4 Dowl. 134.

(*h*) He may also proceed to enforce his judgment by attachment of a debt due to the estate of the executor under R. S. C. 1883, Ord. XLV., and a Court of Equity

by *fieri facias:* First, as to the proceeding by *fieri facias* or *scire fieri* inquiry: If the sheriff returned, as he might do if he pleased, not only *nulla bona* but also a *devastavit*, to a *fieri facias de bonis testatoris* sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisf.*, or *fieri facias de bonis propriis* (*i*). And it seems that the sheriff runs no risk by returning a *devastavit;* for the judgment, and no assets to be found, was sufficient evidence of a *devastavit*, in an action against him for a false return (*k*).

by *scire fieri* inquiry: But if the sheriff returned *nulla bona* generally, without also returning *devastavit*, the ancient course was to issue a special writ, for the sheriff to inquire by a jury whether the defendant had wasted any of the goods of the deceased: And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to show cause why the plaintiff should not have execution *de bonis propriis*, to which *scire facias* the defendant might appear and plead. Subsequently, for the sake of expedition, the inquiry and *scire facias* were made out in one writ, which was called a *scire fieri* inquiry; reciting the judgment, *fieri facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then, if it shall appear by inquisition that the defendant hath wasted the goods of the deceased, to give notice to the defendant to appear in Court at the return of the writ to show cause why the plaintiff ought not to have execution *de bonis propriis:* And the same notice of executing such writ was required as of a common writ of inquiry (*l*).

The most usual mode of proceeding has been by action of debt on the judgment suggesting a *devastavit*.

The executor could not plead *plene administravit* to the *scire*

would not restrain such proceedings, notwithstanding there has been a decree for the administration of the estate, if the judgment was obtained before the decree: *Fowler* v. *Roberts*, 2 Giff. 226.

(*i*) 1 Saund. 219, note (8), to *Wheatley* v. *Lane*. The *fieri* inquiry is only for the security of the sheriff: *Rock* v. *Leighton*, 1 Salk. 310; Chitty's Archbold, 14th edit. 1126.

(*k*) *Rock* v. *Leighton*, cited 3 T. R. 692; *S. C.*, 1 Salk. 310.

(*l*) Tidd, 1113, 1114, 9th edit. See the account of the establishment of this practice: 1 Saund. 219, *a*, note to *Wheatley* v. *Lane*.

fieri inquiry; because the judgment against him was conclusive that he had assets to satisfy it (*m*). Neither could he, upon the taking of the inquisition, give in evidence the want of assets (*n*): And it should, therefore, seem, that the jury were bound, upon the judgment being put in evidence, together with the *fi. fa.* and the return, to find a *devastavit*, as suggested in the writ, unless the executor could show that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (*o*). Accordingly, in a case where the under-sheriff, on taking the inquest, directed the jury that the plaintiff was bound to give evidence of the executor's having property of the testator in his hands, and subsequently returned *nulla bona testatoris*, the Court quashed the return and awarded a new *scire fieri* inquiry (*p*). However, the return of a *devastavit* was not conclusive, whether found by the inquisition, or returned by the sheriff; and therefore the executor might traverse it, by denying the *devastavit*, and taking issue on it (*q*). And upon the trial of such an issue he might show that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them (*r*).

by action of debt suggesting a *devastavit*.

The action of debt on the judgment suggesting a *devastavit* was substituted in lieu of the proceeding by *scire fieri* inquiry (*s*). The foundation of this action is the judgment obtained against the executor: which, as there has been already occasion to show (*t*), is conclusive upon him to show that he has assets to satisfy such judgment. If, therefore, upon a *fieri facias de bonis testatoris*, on a judgment obtained against an executor, either no goods can be found which were the testator's, or not sufficient to satisfy the demand (or, which is the same thing, if the executor will not expose them to the execution), that is evidence of a *devastavit;* and, therefore, it is very reasonable that the executor should become personally liable and chargeable *de bonis propriis* (*u*).

(*m*) See *ante*, p. 1583.

(*n*) 1 Saund. 219, *d*.

(*o*) *Ibid.*; *Leonard* v. *Simpson*, 2 Bing. N. C. 179, 180.

(*p*) *Palmer* v. *Waller*, 1 Mees. & Wel. 689; *S. C.*, 5 Dowl. 315.

(*q*) 1 Saund. 219, *c*; *Merchant* v. *Driver*, *ibid.* 306; *Blackmor* v. *Mercer*, 2 Saund. 402.

(*r*) See 1 Saund. 219, *c*; 2 Bing. N. C. 180, 181.

(*s*) *Berwick* v. *Andrews*, 2 Lord Raym. 974; 1 Saund. 219, *a*, note.

(*t*) *Ante*, p. 1583.

(*u*) 1 Saund. 219, *b*, note (8), to

This action may be brought upon the judgment against the executor, upon a bare suggestion of a *devastavit*, without any writ of *fi. fa.* first taken out upon the judgment (*x*). But the usual course is, first to sue out a *fieri facias* upon the judgment, and, upon the sheriff's return of *nulla bona*, to bring the action, and state the judgment, the writ, and return, in the declaration or statement of claim; and, on the trial, the record of the judgment, the *fieri facias*, and the return, will be sufficient evidence to prove the case (*y*).

In this form of action the judgment was *de bonis propriis* (*z*). The executor or administrator might plead that he did not waste, &c., in manner and form, &c., and under this plea he might give in evidence, that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (*a*). But the executor or administrator could not plead *plene administravit*, or any other plea which put his defence upon want of assets: For such plea would be contrary to what was admitted by the judgment: And if the truth were, that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so, he was not permitted to say so afterwards (*b*). Again, if he had pleaded *plene administravit* to the original action, and the judgment was had upon a verdict finding that *he had* assets, he was equally concluded from saying that he had no assets (*c*). And, for the same reason, he could not *give in evidence* the want of assets on the trial of the *devastavit* (*d*).

If a man obtained judgment against an executor, and died, his executor might bring an action upon the judgment against the executor, suggesting a *devastavit:* for such an action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted (*e*). So,

Wheatley v. *Lane; Blackmor* v. *Mercer*, 2 Saund. 403; *Erving* v. *Peters*, 3 T. R. 686; *Farr* v. *Newman*, 4 T. R. 637.

(*x*) *Wheatley* v. *Lane*, 1 Sid. 397; 1 Saund. 219, *c*, note.

(*y*) *Challoner* v. *Challoner*, cited in *Skelton* v. *Hawling*, 1 Wils. 259; *Erving* v. *Peters*, 3 T. R. 685; 1 Saund. 219, *c*; S. P. where an irregular *testatum fi. fa.* had been issued and returned *nulla bona: Leonard* v. *Simpson*, 2 Bing. N. C. 176.

(*z*) *Warren* v. *Consett*, 2 Lord Raym. 1502.

(*a*) 1 Saund. 219, *c*, note, *ante*, p. 1599.

(*b*) 1 Saund. 219, *c*, note.

(*c*) *Erving* v. *Peters*, 3 T. R. 693.

(*d*) *Rock* v. *Leighton*, 1 Salk. 310.

(*e*) *Berwick* v. *Andrews*, 2 Lord

on the other hand, if a judgment was had against an executor, who afterwards died, an action might, after the stat. 30 Car. II. c. 7 (*f*), be brought against his executor or administrator, upon the judgment, suggesting a *devastavit* by the first executor, and the judgment was as conclusive upon the representative of the executor, as it was upon the executor himself. Therefore, if an action of debt, suggesting a *devastavit* by the first executor in his lifetime, was brought against *his* executor or administrator, he could not have pleaded that the first executor fully administered the goods of the first testator, or any other plea, purporting that he (that is, the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done (*g*). For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, by virtue of the statute, made his *personal estate* liable in the hands of his executor or administrator (*h*). But the executor or administrator of the executor might plead, that he, the defendant, had fully administered all the estate of his own testator or intestate (*i*). Moreover the judgment in the action, when brought against the executor or administrator of the executor, against whom the judgment was obtained, was *de bonis testatoris*, or *intestati* (*k*).

Remedy on judgment obtained against the testator.

But no action of debt suggesting a *devastavit* by the executor lay against him upon a judgment obtained *against his testator:* because that was no admission of assets by the executor: and, therefore, in such cases, it was necessary to revive the judgment against the executor, to make him a party to it (*l*).

If the testator died after execution was sued out, the writ could be still executed on his goods in the hands of his executors, without taking any further proceeding (*m*).

But generally speaking, if a defendant died after a final judgment against him, and before execution, the plaintiff could not have execution without reviving the judgment against the personal representative of the defendant (*n*). If, indeed, there

Raym. 971; *S. C.*, 1 Salk. 314; *ante*, p. 607.

(*f*) See *ante*, p. 1354.

(*g*) *Skelton* v. *Hawling*, 1 Wils. 258.

(*h*) 1 Saund. 219, *d*, note.

(*i*) 1 Saund. 219, *e*, note. See *post*, p. 1605.

(*k*) 1 Saund. 219, *f*, note.

(*l*) *Crosby* v. *Geering*, cited in *Berwick* v. *Andrews*, 2 Lord Raym. 972.

(*m*) 1 Chitty's Archb. 810, 14th edit.

(*n*) 2 Saund. 6, note (1) to *Jeffreson* v. *Morton*.

were two or more defendants, and one of them died after judgment, but before execution, the plaintiff was not put to revive the judgment against the personal representative of the deceased, but execution might be had without it against the survivors, within a year (*o*). But the execution in such case was taken out in the joint names of all the defendants, otherwise it would not have been warranted by the judgment (*p*).

Before the Common Law Procedure Act, 1852, the judgment was revived by a writ of *scire facias*, which stated, that the testator died, having made the defendant his executor, or, in the case of an administrator, the death of the intestate, and the grant of administration; and it called on the defendant to show why the plaintiff should not have execution of the debt or damages, to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered (*q*).

But, under that statute the plaintiff might either sue out a writ of revivor in the form given by the Act, or apply to the Court or a Judge for leave to enter a suggestion on the roll, that he was entitled to have execution thereon: And the Act, in the 129th and two following sections, prescribes the mode of proceeding, and course to be pursued in respect of each of these substitutes for a *scire facias*.

With respect to the pleas which an executor or administrator might have pleaded in his defence, he could, it seems, have pleaded *plene administravit*, or a plea that he had nothing in his hands at the time of the death of his testator or intestate, or that no goods came to his hands except so much, if any did, and show how he administered them (*r*).

After the plaintiff had obtained judgment and execution against the executor, he might bring an action of debt in the *debet* and *detinet* on the latter judgment against the executor, suggesting a *devastavit*: And in such action the judgment was conclusive against the defendant, that he had assets: Therefore

(*o*) Tidd, 1120, 9th edit.

(*p*) *Ibid.*

(*q*) Tidd, 1119, 9th edit. In a *scire facias* on a judgment recovered by an executor, the death of the testator need not have been expressly averred: *Moorfoot* v. *Chivers*, 1 Stra. 631; *S. C.*, 2 Lord Raym. 1395; Tidd, *ubi supra*.

(*r*) *Newton* v. *Richards*, 1 Salk. 296; 4 Mod. 296; 1 Lord Raym. 3, 4; 2 Saund. 72, *dd*, note (4); *Hickey* v. *Hayter*, 6 T. R. 384.

he could not plead *plene administravit;* and the judgment was *de bonis propriis* (*s*).

Since the passing of the Judicature Act it would seem that the judgment creditor, on a judgment against the testator, would have to apply for leave to issue execution under R. S. C. 1883, Ord. XLII. r. 23, and if the executor deny on the hearing of the summons that he has in his hands assets of the testator against which execution ought to go, the Judge may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and that the issue would be so framed as to allow the executor to raise any of the defences which he formerly could have raised on the writ of *scire facias*, or under the Common Law Procedure Act. There seems to be nothing in the Order which enables the creditor to raise an issue of *devastavit* under the proceedings directed by it.

Leave given under Ord. XLII. r. 23, to issue execution against the executor of a deceased judgment debtor does not operate as a judgment against the executor; it merely dispenses with the necessity of recovering judgment against him, and consequently does not satisfy the requirements of sects. 14 and 15 of 1 & 2 Vict. c. 110 (*t*).

Proceedings on judgment of assets *in futuro.*

If a judgment of assets *quando acciderint* has been entered against an executor and administrator, the plaintiff cannot have execution until some assets come into the hands of the defendant.

If assets come to the hands of the executor or administrator the plaintiff can apply for leave to issue execution under clause (c) of Ord. XLII. r. 23, above mentioned, which provides that where a party is entitled to execution upon a judgment of assets *in futuro* the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly: And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried.

Although the old practice has been superseded, under which the plaintiff proceeded by an action of debt upon the judgment, or by the writ of revivor, substituted by the

(*s*) *Hope* v. *Bague*, 3 East, 2.

(*t*) *Stewart* v. *Rhodes*, [1900] 1 Ch. 386; *ante*, pp. 665, note (*m*), 1369.

C. L. P. Act, 1852, in lieu of a *scire facias*, yet it seems convenient to retain in this Edition the statement of the pleadings and necessary allegations under a *scire facias*, because such statement will furnish a guide as to what the judgment creditor must allege in his affidavit to entitle him to leave to issue execution under Ord. XLII. r. 23, and as to the form of the issue, should one be directed.

If the judgment was in the ordinary form, it was held necessary to state, in the writ of *scire facias*, that the assets came to the executor's hands *after* the judgment; for that the *scire facias* must pursue the terms of the judgment, which, in this case, were, that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor: Therefore, where a *scire facias*, on such a judgment as this, of assets *quando acciderint*, stated that divers goods, &c., of the testator, sufficient to pay, &c., had come to, and were in the hands of the defendant to be administered, &c., without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods, according to the form and effect of his said recovery, &c., the defendant pleaded, that *after the plaintiff's judgment*, no goods, &c., of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied, that divers goods, &c., had come to the defendant's hands, without adding, *since the judgment;* and on demurrer it was adjudged, that the *scire facias* was wrong, for want of the words "*after the judgment:*" For when an executor pleads *plene administravit*, the plaintiff may either deny, or admit that allegation: if he admits it, he takes judgment, and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered; the praying of judgment is an admission that there are no assets in the executor's hands at that time (*u*).

Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro* (*x*).

Remedies against executor of executor.

For those causes of action which are sustainable against an executor in respect of the acts of the deceased, the plaintiff, on

(*u*) *Taylor* v. *Holman*, Bull. N. P. 169; 2 Saund. 219, *a*, note.

(*x*) *Perryman* v. *Westwood*, cited in 1 Ventr. 95, and 1 Sid. 448.

the death of a *sole* executor, may maintain the action against his executor: for the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (*y*). But, on the death of an executor, without appointing an executor of his own, or on the death of an administrator, the actions above mentioned must be brought against the administrator *de bonis non* (*z*).

With respect to the remedies for the *devastavit* of an executor or administrator, in the event of his death, it has already appeared (*a*) that, at common law, no executor or administrator was answerable for a *devastavit* by his testator or intestate: But, by the statutes 30 Car. II. c. 7, and 4 & 5 Will. & Mary, c. 24, s. 12, this defect has been remedied (*b*). So that, since these statutes, if a judgment be recovered against an executor, who afterwards dies, an action may now be brought against his executor or administrator, suggesting a *devastavit* by the first executor (*c*). And in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor, or administrator of such executor, suggesting a *devastavit* by the former executor. And the judgment must be *de bonis testatoris* (*d*).

Executor is within the County Court Act.

By 51 & 52 Vict. c. 43, s. 95, an executor or administrator may sue or be sued in the County Court as if he were a party in his own right (*e*).

Remedy against executor by distress.

Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term (*f*). And the executor or administrator cannot

(*y*) See *ante*, p. 182.

(*z*) See *ante*, p. 379 *et seq.*

(*a*) *Ante*, p. 1354.

(*b*) *Ante*, p. 1354. See the observations of Wood, V.-C., on these statutes in *Thorne* v. *Kerr*, 2 Kay & J. 63, 64. But the statute of 30 Car. II. c. 7, was held not to make an executor of an executrix *de son tort* liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled: *Wilson* v. *Hodson*, L. R. 7 Ex. 84, *ante*, p. 188, n. (*k*).

(*c*) See *ante*, p. 1599.

(*d*) 1 Saund. 219, *e*, *f*, note (8) to *Wheatley* v. *Lane*; *Coward* v. *Gregory*, L. R. 2 C. P. 153, 137.

(*e*) See *ante*, p. 1535.

(*f*) Wentw. Off. Ex. 291, 14th edit.; *Braithwaite* v. *Cooksey*, 1 H. Black. 465.

plead *plene administravit* in bar to the avowry (*g*). So the distress may be taken by virtue of the stat. 8 Ann. c. 14, ss. 6 and 7, within six months after the determination of the tenancy, if the executor or administrator continues in possession (*h*).

Judgment cannot be entered on warrant of attorney or cognovit given by testator.

The death of either party is the countermand of a warrant of attorney to confess judgment (*i*) ; and, therefore, upon a motion to enter up judgment, if it appears that the defendant is dead, the Court will not grant the motion (*k*). So a *cognovit actionem* is revoked by the death of the party (*l*).

Proceeding against executor on reference to arbitration by testator.

There has already been occasion to consider, in cases of arbitration, the effect of the death of either party, before or after the making of the award (*m*). It may here be observed, that the Court will not grant an attachment against an executor for the non-performance of an award, which was made under a reference by rule of Court entered into by the testator (*n*).

Liability of executor to pay an attorney's bill after taxation.

If a solicitor's bill against the testator should be referred to taxation after his death, questions of difficulty may arise as to the effect of the order for payment by the executor or administrator of the sum found due. In cases where justice requires that the order for taxation should be made, and it nevertheless appears probable that, by reason of deficiency of assets, or the like, payment of the amount found to be due ought not to be made without further investigation, the Court or Judge, by whom the order for taxation is made, ought, it would seem, to abstain from adding the usual order for payment or the delivery up of deeds (*o*).

Proceedings against executors of

If, when a bill of exchange becomes due, and is dishonoured, the drawer or indorser is dead, notice of the dishonour ought to

(*g*) Wentw. *ubi supra*.

(*h*) *Braithwaite* v. *Cooksey*, 1 H. Black. 465.

(*i*) See *ante*, p. 679; Tidd, 551, 9th edit.

(*k*) Tidd, 561, 9th edit. ; *Harden* v. *Forsyth*, 1 Q. B. 177. It will make no difference that the defendant, by the memorandum on the warrant, agreed for himself and his executor that it should be lawful to enter up judgment at any time, notwithstanding he should be dead : *Heath* v. *Brindley*, 2 A. & E. 365.

(*l*) See Chitty's Archbold, 14th edit. 1297 *et seq.* as to the law and practice relating to judgments by cognovit or upon a warrant of attorney; and see also Practice Masters' Rules, (18) and (25).

(*m*) *Ante*, pp. 680, 681.

(*n*) *Newton* v. *Walker*, Willes, 315.

(*o*) See *Re Dalby*, 8 Beav. 469.

be given to his personal representative, if such there be, and with the exercise of reasonable diligence he can be found (*p*). Where the drawee, acceptor, or maker is dead, and no place of payment is specified, the bill or note must be presented to his personal representative, if such there be, and with the exercise of reasonable diligence he can be found (*q*). Where the bill is made payable and is presented at the proper place, and after the exercise of reasonable diligence no persons authorized to pay or refuse payment can be found there, it is not necessary to present it also at the house of the executor or administrator (*r*). In case there is no representative, the holder should demand payment at the house of the deceased (*s*). If the holder of a bill made the acceptor his executor, and died, this, which at law (*t*) operated as a discharge of the debt, by making the debtor executor (*u*) operated also as a discharge of the drawer and prior indorsers (*x*).

parties to bills of exchange.

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court of Exchequer refused to stay proceedings against them in an action in which the debt was not

Effect of injunction.

(*p*) Byles on Bills, 16th edit. 241; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (9); Chalmers on Bills of Exchange, 5th edit. p. 160. In America it has been held that where the indorser of a note is dead at the time it becomes due, and there are executors or administrators at that time known to the holder, notice must be given to them; but that if there are no personal representatives at the time, a notice sent to the residence of his family is sufficient, and that it is not necessary afterwards to give notice to executors or administrators, subsequently becoming such: *Merchant's Bank* v. *Birch*, 17 Johns. R. 25; Bayley, 418, Amer. edit.

(*q*) Byles on Bills, 6th edit. 290; Chalmers on Bills of Exchange, 5th edit. p. 136; 45 & 46 Vict. c. 61, s. 45 (7).

(*r*) *Philpot* v. *Briant*, 3 Carr. & P. 244. Cf. 45 & 46 Vict. c. 61, s. 45 (5).

(*s*) Roscoe on Bills, 147.

(*t*) Chitty on Bills, 11th edit. p. 153. The appointment of a debtor as executor to his creditor did not operate as a discharge of the debtor in equity, but it was considered that the debt had been paid to the debtor executor by himself, and he was held accountable accordingly. The equity rule will now prevail. By sect. 61 of 45 & 46 Vict. c. 61, when the acceptor of a bill is or becomes the holder of it at or after its maturity in his own right, the bill is discharged, but this section does not seem to affect the matter, since the executor acceptor does not become the holder in his own right.

(*u*) See *ante*, p. 1054.

(*x*) Chitty on Bills, 8th edit. 569.

admitted, observing that the injunction might be a ground for applying to stay execution (*y*).

Verdict against testator evidence against executor.

A verdict against a testator or intestate may be produced in evidence against his executor or administrator, and binds him (*z*).

What is good secondary evidence of the contents of the Will.

In an action against executors for money had and received by their testator, the plaintiff relied on an admission of the testator contained in his Will: Notice had been given to the defendants to produce the probate, but no evidence was given to prove that the probate was in their possession: An officer of the Spiritual Court produced a document purporting to be the original Will of the deceased, bearing the seal of the Court, and also an indorsement, made by the officer of the Spiritual Court, purporting that probate had been granted to the defendants on that instrument as of the Will of the deceased, and that they had made oath of the value of the effects accordingly: It was objected, on the part of the defendant, that the Will should have been proved by one of the subscribing witnesses, and further, that probate not being produced, the next best evidence was the act of the Spiritual Court, which was not produced: But it was held that the document produced must be taken as proving that the defendants had obtained probate of the paper, and had therefore treated it as the Will of their testator, and consequently that it ought to be received against them, at all events, as secondary, if not as original, evidence (*a*).

(*y*) *Davis* v. *Salter*, 2 Cr. & J. 466.

(*z*) *R.* v. *Hebden*, Andr. 389; Rose. Ev. 100, 2nd edit. See *Smith* v. *Smith*, 3 Bing. N. C. 29, as to the admissibility of the declarations of the deceased, as evidence against the executor or administrator. See also *Spiers* v. *Morris*, 9 Bing. 687, as to the admissibility of entries made by a deceased executor against his interest.

(*a*) *Gorton* v. *Dyson*, 1 Brod. & Bingh. 219. See *ante*, p. 1574. See also pp. 1530, 1531.

CHAPTER THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN EQUITY.

What suits in equity may be brought against executors, &c.

AN executor or administrator is liable, in his representative character, to all equitable demands, with regard to personal property, which existed against the deceased at the time of his death (*a*).

Executors and administrators considered in equity as trustees.

Again, executors and administrators are for most purposes considered, in Courts of Equity, as trustees (*b*); for instance, they are held in equity to be personally liable for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from their office (*c*): Upon this principle, those Courts have exercised a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the Will, or in case of intestacy, according to the Statute of Distributions (*d*).

(*a*) Toller, 479.

(*b*) Cf. the definitions of "trust" and "trustee" in sect. 50 of the Trustee Act, 1893.

(*c*) *Re Marsden*, 26 C. D. 783, 789.

(*d*) *Adair* v. *Shaw*, 1 Scho. & L. 262. Auxiliary grounds of jurisdiction also formerly existed; such as the necessity of taking accounts and compelling a discovery, and the consideration that the remedy at law, when it existed, was not plain, adequate, and complete. An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own (see the Executors Act, 1830, and *Re Lacy*, [1899] 2 Ch. 149), but such a trust does not take a case out of sect. 8 of the Statute of Limitations, 37 & 38 Vict. c. 57. An executor cannot be deprived of the benefit of the statute by its being shown that he is a trustee; he must be shown to be an express trustee: *per* Lindley, L. J., *Re Jane Davis*, [1891] 3 Ch. at p. 124. Where reversionary legacies were bequeathed and made payable out of a residuary trust fund on the death of a tenant for life, and subject to payment of the legacies

Instances of this:

Hence a Court of Equity will make an order for payment of a personal legacy or for the distribution of an intestate's personal estate (*e*): and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them (*f*): And, even in a case where the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the Court directed an account against him (*g*). So an account has been decreed of an intestate's personal estate, notwithstanding an account before taken, and a distribution decreed in the Spiritual Court (*h*). And a bill was, in the case of *Dulwich College* v. *Johnson* (*i*), held on demurrer to be properly brought for the discovery of assets, before the Will was proved, during the litigation thereof in the Probate Court (*k*).

Right of individual creditors.

A single creditor may sue in equity for his demand out of the personal assets, and may, as at law, gain a preference, by the judgment in his favour, over other creditors in the same degree, who may not have used equal diligence (*l*). But a person entitled to a share of a sum of money, which is due as a debt from the testator, must sue on behalf of himself and all other parties interested in the debt, or make those other persons parties to the suit (*m*).

the trust fund was to be held for the residuary legatee absolutely, it was held that the legacies were not trust legacies within the meaning of the above section: *Re Barker*, [1892] 2 Ch. 491. But where a testatrix bequeathed the residue of his money to an infant, it was held that, the estate being cleared and the residue ascertained, the executor would hold the residue in trust for the infant within the meaning of sect. 43 of the Conveyancing and Law of Property Act, 1881, and was entitled to apply the income for maintenance: *Re Smith*, 42 C. D. 302. See also *post*, p. 1655 *et seq.* See further as to when an executor is *functus officio*, and becomes clothed with the character of a trustee: *Re Timmis*, [1902] 1 Ch. 176.

(*e*) Com. Dig. Chancery (3 D. 1); *Howard* v. *Howard*, 1 Vern. 134.

(*f*) In *Brooks* v. *Oliver*, Ambl. 406, the acting executor, to whom the produce of an estate in Antigua, belonging to an infant, was consigned, was directed to account annually by affidavit.

(*g*) *Gibbons* v. *Dawley*, 2 Chanc. Cas. 198.

(*h*) *Bissell* v. *Axtell*, 2 Vern. 47.

(*i*) 2 Vern. 49.

(*k*) See also *Phipps* v. *Steward*, 1 Atk. 285. See, however, the more modern practice of appointing a receiver pending grant of probate, *ante*, pp. 399, 402.

(*l*) See *ante*, p. 782; Mitf. Pl. 5th edit. 193. See *Att.-Gen.* v. *Cornthwaite*, 2 Cox, 44.

(*m*) *Alexander* v. *Mullins*, 2 Russ. & M. 568.

The right of a creditor to sue on his own behalf and on behalf of the other creditors, where he desires to have the real estate of his deceased debtor administered, will be found discussed later in the chapter (*n*).

Executor, &c., liable to be sued for testator's debts from moment of death.

Although an executor has a year allowed him in equity to pay legacies, that does not extend to debts, but he is liable to be sued for debts the moment after the testator's death (*o*).

Suit against executor by testator's debtor to restrain action on ground of intended misappropriation of the fund not maintainable:

A debtor to a testator cannot maintain a suit against the personal representative, to obtain the directions of the Court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative to recover the debt, on the ground that the debt has been appropriated by the testator for a particular purpose, and that the personal representative intends to apply it for purposes not warranted by the Will (*p*).

Parties:

The general rule is, that if there are several executors or administrators, they must all be sued, though some of them be infants (*q*). Therefore, a person cannot, either as creditor or residuary legatee, maintain a suit in equity against one co-executor only (*r*). But it is only necessary to sue so many of the executors or administrators as have acted: this is the same at law (*s*). Where an executor in trust was outlawed, and a witness proved that he had inquired after, and could not find

(*n*) See *post*, p. 1641.

(*o*) *Nicholls* v. *Judson*, 2 Atk. 301.

(*p*) *Darthez* v. *Winter*, 2 Sim. & Stu. 536.

(*q*) 16 Vin. Abr. 251, tit. Party (B.), pl. 20. An infant may be appointed executor at any age, but he cannot act as sole executor till twenty-one: *ante*, pp. 159, 160. An infant who has proved the Will is bound by all things which he doth according to the office and duty of an executor, but things which he doth against the office of an executor should not bind him, forasmuch as he is within age; and therefore a release by an infant executor does not bar him: *Russel's Case*, 5 Co. Rep. 27a. But though he might administer, yet he could not till he was of full age commit a *devastavit* (*Whitmore* v. *Weld*, 1 Vern. 328), and he is not liable to account for his receipts during the period of his infancy: *Hindmarsh* v. *Southgate*, 3 Russ. 324. Nor is he liable if he waste assets which come to him as executor *de son tort*: *Stott* v. *Meanock*, 31 L. J. Ch. 746; Simpson on Infants, 2nd edit. p. 106.

(*r*) *Scurry* v. *Morse*, 9 Mod. 89. As to adding defendants, see R. S. C. 1883, Ord. XVI. r. 11.

(*s*) *Ante*, p. 1569. And much more therefore in a Court of Equity: *Brown* v. *Pittman*, Gilb. Eq. Rep. 75; *Strickland* v. *Strickland*, 12 Sim. 463; *Dyson* v. *Morris*, 1 Hare, 413.

him, it was held that it was not necessary to make him a party (*t*).

When *cestuis que trust* are necessary parties.

Although one of two executors or trustees may sue the other executor or trustee without making the *cestuis que trust* parties to the suit, yet where such *cestuis que trust* have participated in the breach of trust they are necessary parties (*u*).

Defendant dying pending action.

If during an action the defendant dies, the action can be continued against his personal representative, and it makes no difference in this respect whether the defendant dies before or after decree (*x*).

Actio personalis moritur cum personâ.

As has been pointed out in an earlier part of this Work (*y*), some causes of action do not continue after the death of the wrongdoer, and, consequently, do not survive against his executor, but the maxim *actio personalis moritur cum personâ* does not apply to remedies for breaches of contract, express or implied, nor does it apply to those cases of tort, where, by means of a wrongful act done by a deceased person, property or the proceeds or value of property have been appropriated by the deceased person and added to his estate (*z*). Nor will the maxim prevent a claim by a person standing in a fiduciary relation to the deceased, where the latter has abused his position, the act in such a case being a breach of a *quasi* contract (*a*). The rule at common law was that executors could not be sued for a wrong committed by their testator for which only unliquidated damages were recoverable; and the rule in equity is the same (*b*).

Where no legal personal representative the Court may appoint or dispense with.

By R. S. C. 1883, Ord. XVI. r. 46, it is provided that "if in any cause, matter, or other proceedings it shall appear to the Court or Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person

(*t*) *Heath* v. *Percival*, 1 P. Wms. 684. An administrator, though insolvent, must be made a party to a bill for a discovery of assets: *Ashurst* v. *Eyre*, 2 Atk. 51. So although he actually releases, he must be a party to the suit: *Smithby* v. *Hinton*, 1 Vern. 31.

(*u*) *Jesse* v. *Bennett*, 6 De G. M. & G. 609.

(*x*) For the practice where a defendant dies, see R. S. C. 1883, Ord. XVII.

(*y*) *Ante*, p. 606. See also chapter on the "Remedies for Executors in Equity," *ante*, p. 1536.

(*z*) *Phillips* v. *Homfray*, 24 C. D. 439; *Re Duncan*, [1899] 1 Ch. 387.

(*a*) *Concha* v. *Murrieta*, *De Mora* v. *Concha*, 40 C. D. 543.

(*b*) *Kirk* v. *Todd*, 21 C. D. 484, 488; *Re Duncan*, *ubi supra*.

representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons (if any) as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or other proceeding."

Cases to which rule does not apply.

The section of the Chancery Procedure Act (*c*) from which this rule was taken, was held by Lord Romilly (*d*) not to apply to the three following cases: first, where the estate of the deceased person is that which is being administered in the suit; secondly, where the interest of the deceased person is adverse to that of the plaintiff; thirdly, where the representative of the deceased person has active duties to perform.

Kindersley, V.-C., in the case of *Silver* v. *Stein* (*e*) held that the section only applied to those cases where a certain individual who, when living, was interested in the suit, and was made a party had died, but this ruling does not appear to have been followed in later cases (*f*).

Sole plaintiff dying insolvent.

In one case (*g*), where a sole plaintiff died insolvent, the Court, on the application of the sole defendant, appointed a person to represent the deceased plaintiff's estate, so as to enable the defendant to have an opportunity of moving to dismiss the action for want of due prosecution (*h*).

A creditor cannot sue a person named as executor in a Will unless he has either administered or obtained a grant of probate (*i*).

Protection of the estate pending grant

But the Court will, before probate or letters of administration of the estate have been granted, interfere on behalf of a creditor

(*c*) 15 & 16 Vict. c. 86, s. 44.

(*d*) *Moore* v. *Morris*, L. R. 13 Eq. 139, 140. See also *Groves* v. *Levi*, 9 Hare, App. xlvii., and cases cited on same page.

(*e*) 1 Drew. 295.

(*f*) See *Chaffers* v. *Headlam*, 9 Hare, App. xlvi.; *Swallow* v. *Binns*, *ibid.* xlvii.; *Re Peppitt's Estate*, 4 C. D. 230.

(*g*) *Wingrove* v. *Thompson*, 11 C. D. 419.

(*h*) For instances of the exercise of this jurisdiction, see *Mortimer* v. *Mortimer*, 11 W. R. 740; *Crossley* v. *City of Glasgow Assurance Co.*, 4 C. D. 427; *Webster* v. *British Empire Co.*, 15 C. D. 169; *Curtius* v. *Caledonian Fire and Life Insurance Co.*, 19 C. D. 534.

(*i*) *Mohamidu Hadjar* v. *Pitchey*, (P. C.) [1894] A. C. 437.

of probate or administration.

or beneficiary in case of need to protect the estate of the deceased by the appointment of a receiver or manager or both (*k*).

Receiver pending litigation in the Probate Division.

The subject of the appointment of a receiver, during a litigation in the Probate Division for probate or administration, has been already considered (*l*), and mention made of the provisions of the Probate Act, relative to the appointment of receivers of real estate *pendente lite* (*m*).

An application for the appointment of a receiver pending probate should not be made to the Chancery Division except there are special circumstances, such as danger to assets, requiring the appointment (*n*). Such applications being on the way to probate proceedings are properly made in the Probate Division, and if made elsewhere will not be encouraged (*o*).

Claim for protection and administration.

The addition of a claim for administration of the estate to a claim for its protection until the appointment of a legal personal representative has been held to be irregular (*p*).

When, after grant of probate or administration, application can be made to Chancery Division.

The fact that the executor declines to admit assets, and that consequently, if a receiver be not appointed, the executor may prefer one creditor to another, is not sufficient ground for application to the Court (*q*). The Court will not appoint a receiver merely for the purpose of depriving him of his right of preference (*r*), nor will it interfere with an executor's right of retainer by appointing a receiver in a creditor's administration action, merely because he will probably exercise his right to the prejudice of the general body of creditors, nor unless it is shown that the assets are being wasted (*s*). The Court will, however, make an administration decree in order to prevent an undue preference (*t*).

(*k*) *Steer* v. *Steer*, 2 Dr. & Sm. 311; *Nothard* v. *Proctor*, 1 C. D. 4; *Blackett* v. *Blackett*, 24 L. T. 276. For form of order, see Seton, 6th edit. p. 757.

(*l*) *Ante*, pp. 402, 403.

(*m*) *Ante*, p. 399.

(*n*) *Re Henderson*, 2 Times Rep. 322.

(*o*) *Re Henderson*, *supra*; *Re Parker*, 54 L. J. Ch. 694; *In the goods of Moore*, 13 P. D. 36. A receiver, however, cannot be appointed before a writ has been issued. Caveat proceedings, which terminate by appearance, do not constitute a *lis pendens* or furnish any mode of approaching the Court: *Slater* v. *Slater*, [1896] P. 291. See further, *post*, p. 1685.

(*p*) *Overington* v. *Ward*, 34 Beav. 175; *Rawlings* v. *Lambert*, 1 J. & H. 458.

(*q*) *Phillips* v. *Jones*, 28 Sol. J. 360.

(*r*) *Per* Chitty, L. J., in *Re Stevens*, [1898] 1 Ch. at pp. 173, 174.

(*s*) *Re Wells*, 45 C. D. 569; *Re Stevens*, *supra*.

(*t*) See *ante*, p. 782 *et seq.*

If, in the case of an executor or administrator, any misconduct, waste, or improper disposition of the assets is shown, or if he is out of the jurisdiction, the Chancery Division will instantly interfere and appoint a receiver (*u*). So the bankruptcy of a sole executor and trustee is a ground for such an appointment (*x*). But the administration is not to be taken from the executor upon slight grounds, as, for instance, merely on the ground of his poverty (*y*), although a receiver has been appointed where the husband of an executrix was in bad circumstances (*z*). .

When a receiver is appointed against an executor, &c.

The Court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets (*a*).

Executors of receiver.

The Court will, as a rule, immediately upon admission of assets by an executor or administrator, order so much as he admits to have in his hands to be paid into Court: though it was formerly thought necessary for the plaintiff to show that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances (*b*). It seems, however, that this rule is not absolute, but that where a creditor is suing for his own debt only, or where the application is by persons interested in reversion subject to a tenancy for life, some reasonable ground such as danger to the fund ought to be made out (*c*).

Motion for payment of money into Court.

(*u*) *Anon.*, 12 Ves. 5, by Sir Wm. Grant; *Middleton* v. *Dodswell*, 13 Ves. 268. See also *Havers* v. *Havers*, Barnard. Chanc. 24; *Richards* v. *Perkins*, 3 Y. & Coll. 299.

(*x*) *Re Johnson*, L. R. 1 Ch. 325. The fact of the assignees not being before the Court was held not a sufficient reason for refusing to appoint a receiver. Cf. *Re Hopkins*, 19 C. D. 61; and see *Bowen* v. *Phillips*, [1897] 1 Ch. 174; Dan. Ch. Pr. 7th edit. 1416.

(*y*) *Middleton* v. *Dodswell*, 13 Ves. 268. See *Smith* v. *Smith*, 2 Y. & Coll. 353; *Whitworth* v. *Whyddon*, 2 M. & G. 52. Mere poverty is not sufficient: *Hathornthwaite* v. *Russell*, 2 Atk. 126; *Anon.*, 12 Ves. 4; *Howard* v. *Papera*, 1 Mad. 142; *Manners* v. *Furze*, 11 Beav. 30, 31. See also Dan. Ch. Pr. 7th edit. 1415, 1416.

(*z*) *Taylor* v. *Allen*, 2 Atk. 213; *Scott* v. *Becher*, 4 Pri. 346.

(*a*) *Jenkins* v. *Briant*, 7 Sim. 171. The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to bring an action against the executor for an account. But this course may be avoided if the executor will consent to an order to pass the receiver's accounts and to pay the balance: Dan. Ch. Pr. 7th edit. 1450.

(*b*) *Strange* v. *Harris*, 3 Bro. C. C. 365; *Blake* v. *Blake*, 2 Scho. & Lef. 26; *Robertson* v. *Scott*, 14 L. T. 187.

(*c*) Dan. Ch. Pr. 7th edit. 1469; *Reeve* v. *Goodwin*, 10 Jur. 1050; *Re Braithwaite*, 21 C. D. 121.

Former limitation of rule.

The rule appears to have been limited by Lord Redesdale (*d*) to cases in which there are no debts, or the debts are all paid, and there is no purpose for which the money is to be left outstanding. But the rule appears to be more extensive, and any balance which is admitted to be in the executor's hands will as a general rule be ordered into Court, notwithstanding there are demands on it to which the executor is liable (*e*). Thus in *Yare* v. *Harrison* (*f*), an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the Court to have a sufficient sum paid out again. The plaintiff in the action did recover, and the Court ordered the amount to be paid out to *the plaintiff in the action*, and not to the executor (*g*). However, now, after an administration order has been made, the Judge in whose Court the administration is pending has power, without any further consent, to order the transfer to him of any cause or matter pending in any other Court or Division, and brought by or against the executors or administrators as the case may be (*h*).

Admission of assets in the executor's hands.

Where the executor admits himself to have been a debtor to the testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt, and he is compellable to pay it into Court accordingly (*i*). In this case, the person to pay and the person to receive being the same, the Court assumes that what ought to have been done

(*d*) *Blake* v. *Blake*, 2 Scho. & Lef. 26.

(*e*) *Betagh* v. *Concannon*, 2 Moll. 559; Dan. Ch. Pr. 7th edit. 1469. If an executor admits that all the testator's debts, &c. have been paid, the Court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue: *Dando* v. *Dando*, 1 Sim. 510. But see *Abby* v. *Gilford*, 11 Beav. 28.

(*f*) 2 Cox, 377.

(*g*) It having been suggested in this case, that the executor had incurred unnecessary costs, by defending the action, the question whether he should personally answer to the estate for the amount of such costs was reserved to the hearing.

(*h*) Ord. XLIX. r. 5. See *post*, p. 1644.

(*i*) *Mortlock* v. *Leathes*, 2 Meriv. 491; *Rothwell* v. *Rothwell*, 2 Sim. & Stu. 218; *Costeker* v. *Horrox*, 3 Younge & Coll. 530; *Toulmin* v. *Copland*, *ibid.* 625; *White* v. *Barton*, 18 Beav. 192.

has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realised in the hands of the executor (*k*).

The Court will only act on an admission.

The Court, in making an order of this kind, adheres strictly to the rule of acting on the executor's admission only: and will refuse to proceed upon its knowledge derived from any other source (*l*).

Practice of the Court on interlocutory motion.

The practice of the Court of Chancery originally was to order a defendant to pay money into Court upon an interlocutory motion only when he had by his answer admitted that the sum was in his hands. An admission that the sum in question was due from him to the plaintiff was not sufficient; he must have admitted that it was actually in his hands. The practice was afterwards extended to admissions made by a defendant in affidavits (*m*), and a still further extension was made by Sir G. Jessel, M. R., in *Freeman* v. *Cox* (*n*), by ordering a defendant to pay money upon an affidavit of the plaintiff, which the defendant had not answered, that he had a sum of money in his hands; but this practice ought not to be extended any further, and such orders ought to be made only when it is made out to the satisfaction of the Court that the defendant has the sum claimed in his hands, and that he has no real defence to the plaintiff's demand (*o*). The defendant, however, should state, not merely that no part of the money is in his hands, but further, that it is not in his power or under his control (*p*). And it would seem that the defendant would not escape an order being made against him by stating that he paid the money away the day before to someone to whom he had no right to pay it, and who had no title to receive it (*q*).

Ord. LV. r. 3 (d) of R. S. C., which provides for an order being made on originating summons for "the payment into Court of any money in the hands of the executors or administrators or trustees," applies only to money in the hands of the trustee, executor, or administrator, and if it is not in his hands,

(*k*) *Richardson* v. *Bank of England*, 4 M. & Cr. 174, 175, by Lord Cottenham; Dan. Ch. Pr. 7th edit. 1470.

(*l*) *Richardson* v. *Bank of England*, *supra*; *Meyer* v. *Montriou*, 4 Beav. 343; *Scott* v. *Wheeler*, 12 Beav. 366.

(*m*) *Jervis* v. *White*, 6 Ves. 738.

(*n*) 8 C. D. 148.

(*o*) *Neville* v. *Matthewman*, [1894] 3 Ch. 345.

(*p*) *Re Benson*, [1899] 1 Ch. 39.

(*q*) *Per* North, J., in *Crompton and Evans' Union Bank* v. *Burton*, [1895] 2 Ch. 711.

although he is responsible for it, and ought to bear it, that rule does not apply (*r*).

When order for attachment will be made on failure to comply with order for payment into Court.

If failure to comply with an order for payment of money into Court is a case for attachment, it must be because it falls within the third exception to sect. 4 of the Debtors Act, 1869, which is in these terms:—"Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control" (*s*). In order to bring a case within that exception, it must be proved that the money ordered to be paid into Court is or has been in the actual possession or control of the person sought to be committed. Mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough (*t*).

The Court has jurisdiction to make an order for attachment against a married woman administratrix who fails to comply with an order for payment into Court of a sum of money belonging to the estate of the intestate (*u*).

Money admitted by the executor to be in the hands of his partner is in his own hands for the purpose of being ordered to be paid into Court (*x*).

How the executor may discharge himself.

Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into Court, wholly or partially, by taking credit for sums which he shows a right to retain for his own debt, due from the testator (*y*), or to have allowed him on any just grounds, or which are undisputed (*z*). Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into Court (*a*).

(*r*) *Nutter* v. *Holland*, [1894] 3 Ch. 408, disapproving *Re Chapman*, 54 L. T. (N. S.) 13.

(*s*) *Post*, p. 1667.

(*t*) *Re Fewster*, [1901] 1 Ch. 447, followed by Buckley, J., in *Re Wilkins*, W. N. (1901), p. 203, but stating that he would not express any opinion of his own.

(*u*) *Re Turnbull*, [1900] 1 Ch. 180.

(*x*) *Johnston* v. *Aston*, 1 Sim. & Stu. 73; *White* v. *Barton*, 18 Beav. 192.

(*y*) *Middleton* v. *Poole*, 2 Coll. 246.

(*z*) *Roy* v. *Gibbon*, 4 Hare, 65; *Nokes* v. *Seppings*, 2 Phillim. 19.

(*a*) *Anon.* 4 Sim. 359. See also *Proudfoot* v. *Hume*, 4 Beav. 477, *per* Lord Langdale; *Crompton and Evans' Union Bank* v. *Burton*, [1895] 2 Ch. 711.

But when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorized application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor (*b*).

Not by showing unauthorized payments.

In *Freeman* v. *Fairlie* (*c*), it was held that an admission by an executor that the whole amount of the property was near 40,000*l.*, and that the whole was invested in India on public securities, either in his name, or in the name of the house in which he was a partner, but subject to his disposal, unless some part was in the hands of the said house at interest, which he believed might be the case, was not a sufficient admission of money in his hands to order the payment into Court of any part of it; for though an executor dealing with money in his hands is bound to ear-mark it, yet, if he does not, and cannot answer as to the state of it, the Court has no power to act as upon an admission. But in *Roy* v. *Gibbon* (*d*), it was said by Wigram, V.-C., that the rule was, perhaps, less strict at the present day than it was stated in *Freeman* v. *Fairlie;* and that the practice was, that where a party charged himself with the receipt of a fund, he was bound by that charge till he had relieved himself from it by showing a proper application of the money; and that it was not enough for him whose duty it was to know the truth and be ready with information, to leave the application in doubt, by merely expressing ignorance with regard to the charges to which the fund was liable (*e*).

Freeman v. *Fairlie.*

If there is no danger of the property being lost, from the executor being an insolvent or otherwise, a reasonable time will be allowed for bringing the fund into Court; and a longer time will be allowed when the money is in a foreign country (*f*). And if the assets appear to have been invested on an improper security, time will be allowed (which may, in a proper case, be extended from time to time) to enable the executor to realize the security (*g*). And in fixing the day for payment time will

A reasonable time allowed for payment into Court.

(*b*) *Wyatt* v. *Sharratt*, 3 Beav. 498; *Hinde* v. *Blake*, 4 Beav. 597; *Score* v. *Ford*, 7 Beav. 333; *Roy* v. *Gibbon*, 4 Hare, 65; *Ingle* v. *Partridge*, 32 Beav. 661: or by setting up the adverse title of a third party: *Lord* v. *Purchase*, 17 Beav. 171; *Crompton and Evans' Union Bank* v. *Burton*, [1895] 2 Ch. 711, 714.

(*c*) 3 Mer. 39.

(*d*) 4 Hare, 65.

(*e*) See also *Hinde* v. *Blake*, 4 Beav. 597.

(*f*) *Roy* v. *Gibbon*, 4 Hare, 65.

(*g*) *Score* v. *Ford*, 7 Beav. 333;

be allowed for the trustee, if he desires it, to show that no reason exists for calling the money into Court (*h*).

Relief granted on interlocutory proceeding.

On interlocutory proceedings the relief will be confined to the payment of money into Court, and the Court will not direct any permanent relief such as the repurchase of stock which had been sold by the executor; for that can be done only at the hearing of the cause (*i*).

Though a receiver had been appointed during a litigation in the Probate Court respecting the validity of a Will, the Court of Equity refused, on that account alone, to order the person named as executor to pay into Court money in his hands belonging to the testator's estate received previously to the appointment of the receiver (*k*).

General rule as to payment in.

The general rule as to payment of money into Court is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of those others, to have the fund secured (*l*).

Applications for—how made.

Applications for the bringing of money or securities into Court before judgment are usually made by summons. If opposed the summons is frequently adjourned into Court (*m*).

An executor having been ordered to pay money into Court, is not thereby deprived of his right of retainer (*n*), nor of his lien on the fund for his costs (*o*).

Applications for payment out.

The ordinary method of application for payment or transfer out of a fund in Court is by petition, but by virtue of R. S. C. 1883, Ord. LV. r. 2, in the following cases (amongst others) the application can be by summons:

1. Where there has been a judgment or order declaring the rights to the fund (*p*).

Wyatt v. *Sharratt*, 3 Beav. 498; *Hinde* v. *Blake*, 4 Beav. 599.

(*h*) Hill on Trustees, 571; *Hinde* v. *Blake*, 4 Beav. 599.

(*i*) *Futter* v. *Jackson*, 6 Beav. 424; Hill on Trustees, 570.

(*k*) *Reed* v. *Harris*, 7 Sim. 639; *Edwards* v. *Edwards*, 10 Hare, App. II. lxiii.

(*l*) *Freeman* v. *Fairlie*, 3 Mer. 29. Where part of a residuary estate has been invested on an improper security, and the defendant has an interest therein, the Court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into Court to the share of the plaintiff: *Score* v. *Ford*, 7 Beav. 333.

(*m*) Dan. Ch. Pr. 7th edit. 1478.

(*n*) *Ante*, p. 788.

(*o*) *Blenkinsop* v. *Foster*, 3 Younge & Coll. 207, *coram* Alderson, B.

(*p*) As to what amounts to an order declaring rights, see *Re Brandram*, 25 C. D. 366; *Re Evan Evans*, 54 L. T. 527. Where a question of construction requires decision, a petition should be presented: *Re Hicks*, 63 L. J. Ch. 568.

2. Where the title depends only upon proof of the identity, or the birth, marriage, or death of any person (*q*).

3. Where cash or securities not exceeding 1,000*l.* in amount or nominal value are standing to the credit of any cause or matter.

4. Where the application is for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise.

By Ord. LIVB. r. 5 (R. S. C. Trustee Act, 1893), it is now provided that an application under the Trustee Act, 1893, relating to a fund paid into Court in any case coming within the provisions of Ord. LV. r. 2, may be made by summons; and R. S. C. 1883, Ord. LV. r. 2 (4), (5) and (8), which related to applications under s. 32 of the Legacy Duty Act, the Trustee Relief Acts (10 & 11 Vict. c. 96 and 12 & 13 Vict. c. 74), and the Trustee Acts, 1850 and 1852, all of which are now repealed, are superseded by the above rule (*r*).

Petition or summons.

The application for payment out must be by petition, not by summons, when it is for payment of a share less than 1,000*l.* of a fund in Court exceeding 1,000*l.* in amount (*s*), or where the fund in Court consists of cash less than 1,000*l.* and securities of a less nominal amount than 1,000*l.* but both together exceeding that amount (*t*), and the costs of a petition were allowed where the fund was brought over 1,000*l.* by accrued interest (*u*).

Notice to beneficiaries.

The present practice is that as a general rule funds in Court belonging to the estate of a deceased person should not, after the expiration of ten years from his death, be paid to his legal personal representative without notice to beneficiaries (*x*).

(*q*) *Semble*, if the amount is large a petition should be presented except in a very simple case: *Re Rhodes*, 31 C. D. 499; *Re Broadwood*, 55 L. J. Ch. 646. But North, J., held, in *Bates* v. *Moore*, 38 C. D. 381, that the mere size of the fund was not alone sufficient ground for a petition, unless there was difficulty in the matter as well. Cf. *Re Brandram*, 25 C. D. 366.

(*r*) As to payment out of Court on an originating summons, see Ann. Pr. 1904, pp. 763, 783. See also Supreme Court Funds Rules, 1894.

(*s*) *May* v. *Dowse*, W. N. (1884), p. 122; *Re Evan Evans*, 54 L. T. 527.

(*t*) *Re Haworth*, W. N. (1885), p. 48.

(*u*) *Ex parte Trustees of Finsbury, &c. Savings Bank*, W. N. (1886), p. 150.

(*x*) The former practice required notice to be given to beneficiaries of any application for payment out of Court to a legal personal representative made twenty years or more after the death of the testator or intestate. See W. N. (1904), p. 135, "Practice Note."

Production of papers, &c.

The general rule as to papers and writings is, that an executor representing an estate should deposit them, for the benefit of the parties interested, in the Central Office (*y*), unless there are other purposes which require that he should retain them in his own hands (*z*). But where the production of documents is required, the application for it must in all cases be made by summons at Chambers, and the party required to produce will then be ordered to file an affidavit, stating what documents he has, or has had, in his possession or power relating to the matters in question, and to produce them (excepting such as he may by his affidavit object to produce) to the party requiring production (*a*).

Vesting orders as to land under sect. 26 of Trustee Act, 1893.

By the Trustee Act, 1893, s. 26, the High Court is empowered to make an order for the vesting of land in any such person, in any such manner and for any such estate as it may direct, in any of the following cases:—

(i.) Where the High Court appoints or has appointed a new trustee;

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person, is an infant, or out of the jurisdiction, or cannot be found;

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land;

(iv.) Where as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead;

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(*y*) R. S. C. Ord. LXI. r. 31. The place for deposit is the General Filing Office, Room 83, Royal Courts of Justice.

(*z*) *Freeman* v. *Fairlie*, 3 Mer. 30.

(*a*) See Ord. XXXI. r. 14. *Primâ facie* evidence in support of a claim will entitle a creditor in an administration suit to an order directing the executors to file an affidavit as to their possession of documents relating to the claim, or to any item in it: *Re McVeagh*, 1 De G. J. & S. 399. The old practice was for the party producing the documents to leave them at the Record and Writ Clerk's Office (now the Central Office). It is now the ordinary practice to produce them at his solicitor's office, but this is only a matter of indulgence and convenience: *Prestney* v. *Mayor of Colchester*, 24 C. D. 379.

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

or in the case of any such contingent right, the Court may release or dispose of it to such person as it may direct.

Vesting orders under sect. 29 of same Act, in place of reconveyance of mortgaged lands.

Similarly by sect. 29 of the same Act the Court is empowered to make vesting orders in the case of mortgaged lands, where there is a difficulty in obtaining a reconveyance from the heir or personal representative or devisee of the mortgagee, by reason of his being out of the jurisdiction, or refusing to convey, or by reason of there being no heir or personal representative of a mortgagee who has died intestate as to the land, or of any uncertainty as to the identity of the heir or personal representative or devisee of the mortgagee as to whether he is living or dead.

Vesting orders under sect. 35 of stock and choses in action.

Sect. 35 contains similar provisions to those of sect. 26 with respect to vesting orders as to stock and choses in action.

Definition of "trust" and "trustee" in Trustee Act, 1893.

By sect. 50 of the Act (the interpretation clause), the expressions "trust" and "trustee" include *inter alia* the duties incident to the office of personal representative of a deceased person.

Provisions of Lunacy Act, 1890, as to lunatic trustees.

Sect. 135 of the Lunacy Act, 1890, empowers the Judge in lunacy to vest land in such persons for such estate and in such manner as he directs, where it is vested in a lunatic (*b*) solely or jointly upon trust or by way of mortgage; and by sect. 136 of the same Act, where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock or to receive the dividends thereof or to sue for the chose in action, and where the lunatic is jointly so entitled, then in the person or persons with whom he is jointly entitled either alone or jointly with any other person or persons (*c*); and by sub-sect. (3) of the same section, where any stock is standing in the name of a deceased person whose personal representative is a lunatic, or

(*b*) By sect. 341 of the Act, a lunatic is defined as meaning an idiot or person of unsound mind.

(*c*) Under the corresponding section (sect. 5) of the Trustee Act, 1850, where one of three executors

when a chose in action is vested in a lunatic as the personal representative of a deceased person, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof or to sue for the chose in action in any person or persons he may appoint (*d*).

Definition of "trust" and "trustee" in Lunacy Act, 1890.

The words "trust" and "trustee" are defined in sect. 341 of the Lunacy Act, 1890, as including *inter alia* the duties incident to the office of personal representative of a deceased person.

In cases where a vesting order of trust property is sought on the appointment of a new trustee in the place of a lunatic, resort must be had to the Lunacy jurisdiction (*dd*), and where a vesting order is sought, which, if made in Lunacy alone, could only affect the interest of the lunatic, and might, therefore, where the lunatic is not sole trustee, sever the joint tenancy of the trustees, the jurisdiction of the Chancery Division, as well as that of the Court in Lunacy, has to be sought (*e*), and the summons or petition intituled in the Chancery Division as well as in Lunacy. Inasmuch as the Lunacy Act, 1890, does not extend to Scotland or Ireland (see sect. 2 of the Act), the same dual jurisdiction has sometimes to be invoked where part of the land (*f*) or stock (*g*) to be dealt with is not within the Lunacy Act (*h*).

Judicial Trustees Act, 1896.

By the Judicial Trustees Act, 1896, it is now enacted that the Court may, in its discretion, on application by or on behalf of any person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, appoint a judicial trustee

of the surviving executor of a testator was of unsound mind, an order was made giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator: *Re Wacher*, 22 C. D. 535.

(*d*) Cf. the corresponding section (sect. 6) of the Trustee Act, 1850. And see *Re White*, L. R. 5 Ch. 698.

(*dd*) *Re M.*, [1899] 1 Ch. 79.

(*e*) See Dan. Ch. Pr. 7th edit. p. 1791; *Re Pearson*, 5 C. D. 982, a case decided under the Trustee Act, 1850. Cf. also *Re Duce's Trusts*, 30 W. R. 759, decided under sects. 5, 32, and 35 of the same Act: *Re Chell*, 49 L. T. 196, in which Cotton, L. J., followed *Re Pearson*. A vesting order is made where the Court is appointing new trustees; where trustees are already appointed an order is made appointing a person to convey in the place of the lunatic: *Re Vicat*, 33 C. D. 103; *Re Dewhirst's Trusts*, *ibid.* 416. The jurisdiction in Lunacy to appoint a new trustee or new trustees is under sect. 141 of the Act of 1890.

(*f*) *Re Lamotte*, 4 C. D. 325.

(*g*) *Re Hodgson*, 11 C. D. 888.

(*h*) Dan. Ch. Pr. 7th edit. pp. 1791, 1792.

of the trust, either solely or jointly with any other person, and, if sufficient cause is shown, in place of all or any existing trustees (*i*).

And sect. 1 (2) of the Act provides that the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee within the meaning of the Act.

Sect. 3 of the Act provides for the relief of trustees acting honestly and reasonably against the consequences of a breach of trust (*k*).

Rules under Judicial Trustees Act, 1896.

Summons for the appointment of new trustees and for vesting orders.

Rules have been made from time to time for carrying the Act into effect, pursuant to sect. 4 (*l*). Prior to 1889 applications to the Court for the appointment of new trustees, or for vesting orders, were by petition; but by Ord. LV. r. 13a (printed as rule 5 of Ord. LIVB.), it is now provided that the following applications under the Trustee Act, 1893, may be made by summons:—

(a) For the appointment of a new trustee with or without a vesting or other consequential order;

(b) For a vesting order, or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or Judge, or out of Court;

(c) For a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock, or the suing for or recovering any chose in action.

Duty of executor to keep clear accounts.

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer: If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted: It is a more difficult question, as between an executor, bound to produce, and his partner in trade: but if the partners have *permitted* him to mix the accounts, it seems they cannot afterwards object to the production: clearly they cannot do so, in a case where the executor

(*i*) The Court has power under this Act to remove an executor and appoint a judicial trustee: *Re Ratcliff*, [1898] 2 Ch. 352.

(*k*) See as to the words "honestly and reasonably," *Re Roberts*, 76 L. T. 479; *Re Barker*, 77 L. T. 712.

(*l*) See Current Index to Law Reports, 1897, p. lxxiii.; 1899, p. cxxiii.; 1900, p. xcii.

has admitted having lent to his firm part of the trust property, and that the firm has been dealing with it (*m*).

In the case of *Freeman* v. *Fairlie* (*n*), an executor in India, coming to England, and after twenty-one years, being called upon to account, alleged that he had left his books, &c., behind him in India; but he was nevertheless ordered to produce copies of all entries in such books, &c., within six months, though it was impossible he could do so, in order that the Court might have an opportunity from time to time of seeing that he had used proper diligence.

Costs of furnishing accounts.

Trustees can, where they are required to furnish accounts in respect of their trust estate, demand to be paid or to be guaranteed the costs of doing so, before complying: it makes no difference that one of the trustees is a solicitor (*o*).

What an executor is liable to account for under the usual administration decree.

Under the usual administration decree obtained on a writ or originating summons, an executor or administrator can only be charged for actual receipt by himself, or his agent, not for a default of his co-trustee (*p*). The practice is to make executors and administrators only account for the money they themselves have received, not for what they might have received, but for their own default; to make them account, on the latter footing, a special case must be made (*q*), and the plaintiff must aver and prove at least one act of wilful default (*r*), and if what is averred is admitted, the practice is only to make the common decree, adding a submission by the executor to account with respect to the matters so admitted (*s*).

Wilful default.

Order on footing of wilful default can be made at any stage of action.

An order charging wilful default can be made at any time during the action (*t*) on a proper case being shown (*u*).

(*m*) *Freeman* v. *Fairlie*, 3 Mer. 43, 44. The Court, however, will not order a defendant, who has a joint possession of a document with someone else not before the Court, to produce the document itself: *Taylor* v. *Rundell*, Cr. & Ph. 111; Dan. Ch. Pr. 7th edit. 1570.

(*n*) 3 Mer. 44.

(*o*) *Re Bosworth*, 58 L. J. Ch. 432.

(*p*) *Re Fryer*, 3 K. & J. 317; *Blakeley* v. *Blakeley*, 1 Jur. N. S. 368.

(*q*) *Shepherd* v. *Towgood*, T. & R. 379, 388; *Pybus* v. *Smith*, 1 Ves. 193; *Barber* v. *Mackrell*, 12 C. D. 534; *Re Stevens*, [1897] 1 Ch. 422; [1898] 1 Ch. 162 (A.C.). But see *Bulstrode* v. *Bradley*, 3 Atk. 582; *Re Stuart*, 74 L. T. 546; *Re Newland*, W. N. (1904) 181, *ante*, p. 1511.

(*r*) *Sleight* v. *Lawson*, 3 K. & J. 292; *Re Youngs*, 30 C. D. 421; *Re Stevens*, [1897] 1 Ch. 422, 432, *per* North, J.

(*s*) *Wildes* v. *Dudlow*, W. N. (1870), p. 231.

(*t*) This is the modern practice; the old practice did not allow this to be done; see Seton, 4th edit. p. 477.

(*u*) *Job* v. *Job*, 6 C. D. 562; *Mayer* v. *Murray*, 8 C. D. 424; *Barber* v. *Mackrell*, 12 C. D. 534.

Where a common administration order has been obtained against a defendant, the leave of the Court must be obtained, in order to continue the action against him on the footing of wilful default (*x*). After common decree leave necessary.

In actions in which there are no pleadings a charge of wilful default can be raised by affidavit (*y*). How raised where no pleadings.

If the statement of claim alleges wilful default, but the judgment at the trial gives no relief on that footing, but does not dismiss the claim for that relief, the Court can, at any subsequent stage of the proceedings, upon evidence of wilful default, direct further accounts and inquiries on that footing (*z*). Not asked for at judgment.

Where the plaintiff by his statement of claim alleges wilful default, he must be prepared to support his allegations at the hearing; he has no right to insist on the question of wilful default being left to be decided at some subsequent stage of the action (*a*). Allegations of wilful default must be proved at hearing;

The burden of proof is on the party alleging wilful default, and he must show not only a loss, but a loss under such circumstances as to show default on the part of the executor or administrator (*b*). burden of proof of wilful default:

Particulars of the allegations of wilful default should be given in the pleading (*c*). particulars of:

Accounts on the footing of wilful default cannot be obtained under Ord. XV. (*d*).

If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an immediate order for payment without taking the accounts (*e*). The same doctrine prevails though the executor When the Court will decree payment of the plaintiff's demand with-

(*x*) *Laming* v. *Gee*, 10 C. D. 715.

(*y*) *Barber* v. *Mackrell*, 12 C. D. 534.

(*z*) *Re Symons*, 21 C. D. 757.

(*a*) *Smith* v. *Armitage*, 24 C. D. 727.

(*b*) *Re Brier*, 26 C. D. 238.

(*c*) *Re Anstier*, 54 L. J. Ch. 1104. See also R. S. C., Ord. XIX. r. 6, and Forms, App. "C." s. 2, Nos. 2 and 9.

(*d*) *Re Bowen*, 20 C. D. 538.

(*e*) *Woodgate* v. *Field*, 2 Hare, 211. Where the answer admitted assets, but insisted that, under the circumstances stated, the legacy sought to be recovered had been paid, it was held that the plaintiff had a right to read the passage admitting the assets, without reading that as to the payment of the legacy: *Connop* v. *Hayward*, 1 Y. & C. C. C. 33. An admission of assets by the executor's answer is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed: *Wall* v. *Bushby*, 1 Bro. C. C. 484.

out first decreeing an account:

denies assets in hand at the time of filing his answer, if he also discloses that he had at one time sufficient assets, but that he has since misapplied them (*f*). An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the Court think fit to give them (*g*).

where the executor has made himself personally liable by admitting assets, &c.:

Again, if it is charged that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plaintiff can sustain this allegation, he will entitle himself to a decree for payment at once (*h*). And the general rule is, that an admission of assets by an executor or administrator can never be retracted in a Court of Equity, unless a case of mistake be most clearly established (*i*). If, however, a strong case be made out, this may enable the Court to relieve him from the admission (*k*): as if the money were in a banker's hands, who fails: But the executor or administrator must clearly prove the mistake, and show that the circumstance, on which he built his admission, failed (*l*).

The admission of assets by an executor will not preclude creditors from coming on a fund specifically appropriated for their benefit, although that fund may have been disposed of to a purchaser (*m*).

what is an admission of assets.

With respect to what amounts to an admission of assets, it was held in a case (*n*), where the deceased gave money upon mortgage to a charity in Ireland, that his executrix by her own Will

(*f*) *Rogers* v. *Soutten*, 2 Keen, 598.

(*g*) *Philanthropic Society* v. *Hobson*, 2 M. & K. 357. If there are several executors and some admit assets, yet an account may be decreed against the rest: *Norton* v. *Turvill*, 2 P. Wms. 145. Where in an examination put in by two executors, it was stated that their receipts had been joint, but it appeared by affidavit that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental affidavit, to correct the mistake: *Hewes* v. *Hewes*, 4 Sim. 1.

(*h*) *Barnard* v. *Pumfrett*, 5 M. & Cr. 63; *Dimsdale* v. *Dudding*, 1 Y. & C. C. C. 265.

(*i*) *Drewry* v. *Thacker*, 3 Swanst. 548; *Roberts* v. *Roberts*, cited 1 Bro. C. C. 487.

(*k*) See *Foster* v. *Foster*, 2 Bro. C. C. 619; *Young* v. *Walter*, 9 Ves. 365.

(*l*) *Horsley* v. *Chaloner*, 2 Ves. Sen. 85, *post*, p. 1631.

(*m*) *Curtis* v. *Blow*, 2 Barn. & Adol. 426.

(*n*) *Campbell* v. *Lord Radnor*, 1 Bro. C. C. 271; *Barnard* v. *Pumfrett*, 5 M. & Cr. 70.

attempting to provide other means for payment of that legacy, and stating as a reason that his personal estate was out on mortgage, thereby admitted assets of her testator (*o*). Payment of interest for a legacy by the executor, from time to time, will be evidence of assets, though a single instance of payment of interest will not (*p*). So where executors, from time to time, had made some payments on account of principal and interest on a legacy, and, about nine years after the testator's death, passed their accounts at the Legacy Duty office, showing a considerable residue; Lord Langdale held, that the legatee was entitled to an immediate decree for payment of the legacy, without first taking an account of the testator's estate (*q*).

The payment of interest on a legacy, or payment of a legacy not conclusive.

But in *Postlethwaite* v. *Mounsey* (*r*), it was held by Wigram, V.-C., that payment by the executor of the interest of a legacy to the tenant for life under the Will was not conclusive as an admission of assets by the executor; but that such payment might be explained as having been made by mistake, or for other reasons or causes; and that in that case the usual account of assets might be directed: And his Honour observed, that it would be difficult to hold that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the Will: Suppose a case in which small legacies were given to servants, and the executor chose, on his own responsibility, to

(*o*) See also *Elliott* v. *Holwell*, 1 Cas. temp. Lee, 574.

(*p*) *Corporation of Clergymen's Sons* v. *Swainson*, 1 Ves. Sen. 75; *Barnard* v. *Pumfrett*, 5 M. & Cr. 63, 70, by Lord Cottenham; *Att.-Gen.* v. *Chapman*, 3 Beav. 255; *Att.-Gen.* v. *Higham*, 2 Y. & Coll. Ch. C. 634. But payment of the interest of a specific or demonstrative legacy, when that payment is clearly not made out of the general assets, nor a payment referable to the general assets, is not an admission of general assets: *Severs* v. *Severs*, 1 Sm. & G. 400. Executors having invested an infant's legacy in their partnership concern, it was held that the entry by them in the partnership books of the amount of the legacy to the credit of the legatee was a sufficient admission of assets, there being no evidence that the entries were mistaken, and the course of conduct observed being consistent with them: *Townend* v. *Townend*, 1 Giff. 201. For an instance in which a similar entry was held not to amount to an admission of assets, see *Hutton* v. *Rossiter*, 7 De G. M. & G. 9.

(*q*) *Whittle* v. *Henning*, 2 Beav. 396. See further, as to admission of assets by having given a legatee the legacy office receipt for duty on the legacy, *Lazonby* v. *Rawson*, 2 Sm. & G. 267; 4 De G. M. & G. 556; *S. C.*

(*r*) 6 Hare, 33, note (*a*). See also *Cadbury* v. *Smith*, L. R. 9 Eq. 37.

pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the Will: In the subsequent case of *Savage* v. *Lane* (*s*), the same learned Judge held, that, at all events, where the bill in a creditor's suit does not specifically charge the executor with having made himself personally liable, but prays that an account may be taken and the estate administered, the executor's admission in his answer that he has paid certain legacies is not such an admission of assets as to entitle the plaintiff to a decree without taking the account.

General rule.

The general rule, however, is that an admission of assets by the executor to one claimant on them is an admission to all (*t*).

In *Holland* v. *Clark* (*u*), Sarah Clark bequeathed a legacy of 150*l.* to Susannah C., when she should attain 21: The testatrix died in 1811, and the legatee did not attain 21 till several years afterwards, and she then married: In 1825 the executors signed and gave to her husband this memorandum: "We separately and jointly acknowledge to owe to George Holland the sum of 150*l.*, being a legacy left to his wife by the late Sarah Clark, and 50*l.* interest thereon:" And it was held by Knight Bruce, V.-C., that, under the circumstances, this memorandum amounted to an admission of assets by the executors.

The authorities as to the probate stamp being admissible, and its effect in evidence as to the amount of assets, have already been examined (*x*).

It only remains to be noticed that an admission is always susceptible of explanation. Thus, in *Payne* v. *Little* (*y*), Romilly, M. R., observed, that every admission of assets made by an executor, whether it be made by his acts or by an express admission in words, must have reference to the circumstances which he was then acquainted with, and if "the circumstances on which he built his admission fail him" (an

(*s*) 6 Hare, 32. See also *Cadbury* v. *Smith*, L. R. 9 Eq. 41; *Billing* v. *Brogden*, 38 C. D. 546.

(*t*) *Cook* v. *Martyn*, 2 Atk. 2; *Barnard* v. *Pumfrett*, 5 M. & Cr. 70, by Lord Cottenham.

(*u*) 2 Y. & Coll. Ch. C. 319; conf. *Stephens* v. *Venables*, 31 Beav. 124.

(*x*) See *ante*, p. 1590.

(*y*) 22 Beav. 69. See also *Cadbury* v. *Smith*, L. R. 9 Eq. 41.

expression used by Sir John Strange in *Horsley* v. *Chaloner* (*z*)), then the admission fails also, and he cannot be bound by an admission made under circumstances with which he was not acquainted.

Remedy for *devastavit.*

If an executor changes the nature of the testator's estate, the general rule is, that this is a conversion; and as money has no earmark, it cannot be followed (*a*); but the executor by such transactions has made himself liable to a *devastavit* (*b*), for which the party injured must seek satisfaction out of the executor's own effects (*c*). If an executor purchases estates with the assets, and takes the conveyance in his own name, without the trust appearing on the face of the deeds, the estate will not be liable to the trusts, although he die insolvent, unless the application of the purchase money can be clearly proved (*d*).

But if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed, as much as if it had continued in the same condition as at the testator's death (*e*).

Following assets.

The general question, as to the right of creditors and legatees to follow the assets into the hands of the person to whom the executor has aliened them, has been investigated in a former part of this Work (*f*).

In *Skinner* v. *Sweet* (*g*), it appeared that an executrix, in respect of her receipt as such, was considerably indebted to the estate, and that she had an annuity of 250*l.* given to her by the Will: Sir John Leach, V.-C., directed, that her annuity, as it became due, should be applied in payment of the debt due to

(*z*) 2 Ves. Sen. 83.

(*a*) That is, it cannot be followed in the hands of a stranger to the trust, although it can be followed in the hands of the trustees and those claiming under him. See *Re Hallett's Estate*, 13 C. D. 696.

(*b*) *Waite* v. *Whorwood*, 2 Atk. 159. A married woman executrix was, after the death of her husband, held liable for a *devastavit* committed by him during their joint lives: *Soady* v. *Turnbull*, L. R. 1 Ch. 494.

(*c*) *Charlton* v. *Low*, 3 P. Wms. 330.

(*d*) 2 Sugd. Vend. & Purch. 148, 9th edit. See *Kendar* v. *Milward*, 2 Vern. 440; *Kirk* v. *Webb*, Prec. Chanc. 84; *Deg* v. *Deg*, 2 P. Wms. 414, 415; *Ryall* v. *Ryall*, 1 Atk. 59; *Wilkins* v. *Stevens*, 1 Y. & Coll. 431.

(*e*) 2 Atk. 159.

(*f*) *Ante*, p. 700. See also *Downes* v. *Power*, 2 Ball & B. 491; *Silver* v. *Stein*, 1 Drew. 295; *Collinson* v. *Lister*, 20 Beav. 356.

(*g*) 3 Madd. 244.

the estate, with liberty to apply to the Court when the debt due to the estate should be discharged. So where an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore if the executor, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust (*h*).

Party injured, a simple contract creditor only.

The party injured by a *devastavit* is but a simple contract creditor of the executor (*i*), and the claim is consequently barred after the lapse of six years by the Statute of Limitations (*k*), but this does not, or did not, before the Trustee Act, 1888, apply to an action by a beneficiary against the executor (or his estate) who had committed the *devastavit*, as the debt arose from a breach of trust on his part, and from this the Statute of Limitations did not protect him (*l*).

Bankrupt or insolvent executor.

In *Geary* v. *Beaumont* (*m*), a specific legacy was given to an executor, who afterwards became bankrupt, and committed a *devastavit*. The subject of the specific bequest was sold by his assignees: and Sir W. Grant held that the produce in their hands was not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the Will, but that such parties were only entitled to prove to the amount of the *devastavit*.

If an executor becomes bankrupt, having wasted the assets, a proof for the *devastavit* can be taken in under the bankruptcy (*n*). An executor and trustee having committed a *devastavit*, cannot prove under his own bankruptcy without obtaining an order from the Court (*o*). Generally speaking, such order will be made on the application of a bankrupt who is sole executor (*p*),

(*h*) *Morris* v. *Livie*, 1 Y. & Coll. Ch. C. 380, *ante*, pp. 1093, 1137. See also *Barnett* v. *Sheffield*, 1 De G. M. & G. 371.

(*i*) *Charlton* v. *Low*, 3 P. Wms. 331.

(*k*) *Thorne* v. *Kerr*, 2 Kay & J. 54.

(*l*) *Re Marsden*, 26 C. D. 783. As to the effect of the Trustee Act, 1888, see *post*, p. 1661.

(*m*) 3 Mer. 431.

(*n*) Toller, 429.

(*o*) See *Ex parte Colman*, 2 Dea. & Ch. 584. Where the bankrupt is one of several executors, and has before his bankruptcy received a part of the assets, the other executors may prove the amount against his estate: *Ex parte Brown*, 1 Dea. & Ch. 118; *Ex parte Phillips*, 2 Deac. 334.

(*p*) *Ex parte Shaw*, 1 Glyn & Jam. 127; *Ex parte Wyatt*, 2 Deac. & Ch. 211.

but, if leave to prove be given, the dividends should be secured and not allowed to come into the bankrupt's hands (*q*).

Debt due under a *devastavit*, due from what time.

In the case of an executor committing a *devastavit*, and a decree for payment of the amount, the debt is considered as due from the time of the *devastavit*, and not from the date of the decree; and therefore, where a person was committed under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, it was held that as he had, between the time of the *devastavit* and the date of the decree, taken the benefit of the Insolvent Debtors Act, and had been ordered to be discharged by the Court of Quarter Sessions, he might be brought up on a *habeas corpus* before the Chancellor, and discharged (*r*).

A defaulting executor protected from attachment.

A defaulting executor or administrator who becomes bankrupt is protected from attachment by sect. 9 of the Bankruptcy Act, 1883 (*s*), which provides that, after the making of a receiving order, except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose. If he becomes bankrupt after he has been attached he may be released; he is protected from arrest by the order in bankruptcy (*t*).

Exclusion of trust property from property divisible amongst bankrupt's creditors.

Property held by a bankrupt in trust for any other person is expressly excluded from the property divisible amongst his creditors by sect. 44 of the same Act. But where the trustee has a right of indemnity in the nature of a lien upon the goods, such right will pass to the trustee in his bankruptcy, and will have priority over the rights of an execution creditor (*u*).

Interference with the discretion of executors, &c.

The issue of a summons under rule 3 of Ord. LV. does not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such inter-

(*q*) *Ex parte Leeke*, 2 Bro. C. C. 597; *Ex parte Shaw*, 1 Glyn & Jam. 127; *Ex parte Colman*, 2 Deac. & Ch. 584; *Ex parte Moody*, 2 Rose, 413.

(*r*) *Wheldale* v. *Wheldale*, 16 Ves. 376; 3 Madd. Pract. 458, 2nd edit.

(*s*) Cf. s. 12 of the Bankruptcy Act, 1869; and see *Cobham* v. *Dalton*, L. R. 10 Ch. 655; *Nowell* v. *Nowell*, W. N. (1876), p. 248; *Re Neil*, W. N. (1882), p. 46.

(*t*) *Re Manning*, 30 C. D. 480.

(*u*) *Jennings* v. *Mather*, [1901] 1 Q. B. 108.

ference or control may necessarily be involved in the particular relief sought (*x*).

Effect of a judgment for administration.

Even a judgment for administration does not deprive executors or trustees of the right to exercise a discretionary power vested in them (*y*), except so far as the exercise conflicts with the order (*z*); for instance, they can exercise a power of appointing new trustees (*a*): but the Court will see that improper persons are not appointed, and if a person of whom the Court does not approve is appointed, it will call on the trustees to make a fresh appointment. The fact that the decree directs the appointment of new trustees does not take from the trustees their right of appointment, though after decree they can only exercise it subject to the supervision of the Court (*b*). An administration decree does not prevent trustees from exercising a power of sale (*c*).

Discretionary power given to trustees.

Where a testator has given a pure discretion to trustees as to the exercise of a power, the Court will not enforce the exercise of the power against the wish of the trustees or one of them, if such one reasonably entertains a different opinion from that of his co-trustees as to the desirability of exercising it in the particular manner proposed, but it will prevent them from exercising it improperly (*d*); and even where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it (*e*).

Remedy of a creditor of the business.

The remedy of a creditor of the business for a debt incurred since the death of the testator or intestate, is against the executor or administrator personally, and not against the estate of the deceased (*f*); and the creditor's remedy is by action at law against the executor or administrator, and he has no right to have the estate of the deceased administered (*g*). But a creditor

(*x*) R. S. C. Ord. LV. r. 12.

(*y*) *Tempest* v. *Lord Camoys*, 21 C. D. 571, 576, note; *Re Gadd*, 23 C. D. 134; *Re Burrage*, 62 L. T. 752.

(*z*) *Re Hall*, 33 W. R. 508.

(*a*) *Tempest* v. *Lord Camoys*, *supra*; *Re Gadd*, *supra*.

(*b*) *Re Gadd*, *supra*.

(*c*) *Re Mansel*, 33 W. R. 727.

(*d*) *Tempest* v. *Lord Camoys*, *supra*.

(*e*) *Re Burrage*, 62 L. T. N. S. 752.

(*f*) *Farhall* v. *Farhall*, L. R. 7 Ch. 123; *Re Evans*, 34 C. D. 597. See *ante*, p. 1416, and also p. 1554 *et seq.*

(*g*) *Owen* v. *Delamere*, L. R. 15 Eq. 134; *Strickland* v. *Symons*, 26 C. D. 245.

of the business whose debt has been incurred since the decease, can make the executor render to him an account of the assets of the deceased which have been employed in the business since the death (*h*).

A creditor's right to an account of the assets employed in a business.

Lapse of time and an enjoyment of the testator's assets in a manner inconsistent with the trusts of the Will, coupled with the consent of the beneficiaries, may raise an inference of a gift of the assets by the beneficiaries to the executor, and enable his judgment creditor to take them in execution. But when the provision and the time which has elapsed are in accordance with the trusts of the Will, no such inference can arise (*i*).

Remedy of a creditor where the business is properly carried on.

As has been pointed out in the chapter on remedies for an executor in equity, where the executor or administrator properly carries on the business of the deceased, he is entitled to be indemnified out of the assets, which are authorized to be, or can be, otherwise properly applied (*k*) for the purposes of the business. In such case, creditors whose debts have been incurred since the death of the deceased, are entitled to stand in the place of the executor or administrator, and to claim that the fund, out of which he is entitled to indemnity, shall be applied in payment of their debts (*l*).

The same principle applies to the case of the trustee claiming a right of indemnity for a tort, as where an injury had been occasioned to an adjoining owner by letting down the surface of land, in the reasonable management and working of the testator's estate, and damages were recovered against the trustee personally, it was held that the adjoining owner was entitled to stand in the place of the trustee and to claim the benefit of his right to indemnity so as to obtain payment of the damages direct out of the testator's estate (*m*).

Where executor in default.

Where the executor is in default to the specific trust estate he is authorized to employ in the trade, the creditors of the trade are in no better position than the executor himself, and as he is only entitled to be indemnified against the debt he has incurred in carrying on the trade upon the terms of making

(*h*) *Thompson* v. *Dunn*, L. R. 5 Ch. 573.

(*i*) *Re Morgan*, 18 C. D. 93; and cf. *Jennings* v. *Mather*, [1901] 1 Q. B. 108.

(*k*) *E.g.*, where the business is only carried on for the purpose of being realized. See *ante*, p. 1554.

(*l*) *Ex parte Garland*, 10 Ves. 120; *Ex parte Edmonds*, 4 D. F. & J. 488.

(*m*) *Re Raybould*, [1900] 1 Ch. 199.

good his default, the creditors are only entitled to have their debts paid out of the specific assets when the default is made good (*n*).

But where a testator's business is carried on after his death by his trustees under a power in the Will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter, since each of the trustees who has acted properly is entitled to be indemnified (*o*).

Where no specific part of estate can be employed in carrying on the business:

Where neither the whole nor any specific part of the estate is properly applicable to carrying on the trade, creditors of the business have no right to recover their debt out of the trust funds (*p*), but they are entitled to any interest the executor may have in such trade as against the trust estate, *e.g.*, the right to be repaid moneys he has advanced or become liable to pay in respect of the business (*q*).

right of indemnity as against creditors of the testator.

The executor is, as against the beneficiaries, entitled to be indemnified by the trust estate against the debts incurred by him in carrying on the trade out of the specific part of the testator's estate, which he is authorized by the Will to employ in the trade, but this right to indemnity does not apply as against the creditors of the testator unless such creditors had knowledge that the testator's business was being carried on by the executor, and have acquiesced in such trading (*r*).

Dowse v. *Gorton.*

Where the executor of a deceased trader had carried on his business for three years after his death, in accordance with the provisions of his Will and with the assent of the testator's creditors, the Court of Appeal held that the executors had a right to be indemnified against all liabilities incurred by them in carrying on the trade out of the assets acquired subsequently to the testator's death, and that their right to indemnity was confined to such assets, and it also held that the trade creditors of the executors were entitled to stand in the place of the executors in enforcing their claim (*s*). The House of Lords, on

(*n*) *Re Johnson*, 15 C. D. 548.

(*o*) *Re Frith*, [1902] 1 Ch. 342.

(*p*) *Strickland* v. *Symons*, 22 C. D. 666; 26 C. D. 245.

(*q*) *Re Evans*, 34 C. D. 597.

(*r*) *Dowse* v. *Gorton*, [1891] A. C. 190.

(*s*) *Re Gorton*, 40 C. D. 536.

appeal, held that, as the creditors of the testator had acquiesced in the business being carried on by the executors, the executors were entitled to be indemnified out of the testator's estate against the liabilities which they had properly incurred in carrying on the business, and that their right to indemnity was not limited to the assets acquired subsequently to the testator's death, and that the executors were entitled to indemnity, not only as against the beneficiaries, but also as against the testator's creditors (*t*).

Priority of creditors of the executors.

The effect of giving the executors so wide a right of indemnity is to give the creditors of the business, subsequent to the testator's death, a priority over the creditors of the testator in cases where they acquiesced in the trading. This makes it exceedingly important for the creditors of a deceased trader to protect themselves against the risk of the executors carrying on the business at a loss by requiring the estate to be administered without delay.

Conduct of proceedings.

In cases like *Dowse* v. *Gorton*, where the business has been carried on after the testator's death, and the estate is insolvent, the rights of the creditors of the testator, and the creditors of the executors, will conflict, and the question whether a creditor of the one class or the other is to have the conduct of the administration proceedings will probably be governed by the extent to which the estate is deficient. If, for example, the estate is likely to be sufficient only to pay the creditors of the executors, it may be that the conduct of the proceedings will be given to one of them, but if there is likely to be a surplus after satisfying the claims of the creditors of the executors, the conduct of the proceedings should be given to a creditor of the testator as having the greater interest in the administration.

Extension of principle of *Dowse* v. *Gorton*.

The principle of *Dowse* v. *Gorton* is applicable where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, and whether the Will does or does not contain a power to carry on the business (*u*).

Uncorroborated claim.

In claims by creditors against the estate of a dead man the Court looks with suspicion upon a claim which is supported only by the uncorroborated evidence of the claimant (*x*), but there is no rule of law which precludes a claimant from recovering

(*t*) *Dowse* v. *Gorton*, [1891] A. C. 190.

(*u*) *Re Brooke*, [1894] 2 Ch. 600.

(*x*) *Hill* v. *Wilson*, L. R. 8 Ch. 888.

against the estate of a deceased person on his own testimony without corroboration, although the Court will in general require such corroboration (*y*).

Set-off.

It has been shown, in a previous part of this Work (*z*), under what circumstances an executor may retain a legacy, by way of set-off against a debt due from the legatee to the testator (*a*). But the executor cannot set off, against a demand upon him as executor, a debt due to him individually (*b*).

Meaning of "administration action:"

The usual form of relief now given by the Chancery Division against an executor or administrator is to compel him to properly account for the assets of his testator or intestate, and to see that these assets are properly distributed amongst the persons entitled to them, namely, first, the creditors of the deceased, and, secondly, the beneficiaries under the Will or the persons entitled under the intestacy (*c*).

how commenced:

An administration action, like other actions, can usually be commenced by the issue of a writ of summons, but the Rules of the Supreme Court, 1883, provide that, in most cases, creditors or beneficiaries can commence proceedings against executors or administrators by originating summons, and in such proceedings obtain full or partial administration of the dead man's estate.

originating summons.

Rules 3 and 4 of Ord. LV. of the Rules of the Supreme

(*y*) *Re Hodgson*, 31 C. D. 177. See also *Re Finch*, 23 C. D. 267; *Re Farman*, 57 L. J. Ch. 637, 639. See *ante*, p. 1409.

(*z*) *Ante*, p. 1049 *et seq.* See also *Richards* v. *Richards*, 9 Price, 219.

(*a*) In *Re Knapman*, 18 C. D. 300, legatees brought an action against the executor, seeking revocation of probate. While this action was pending they mortgaged their shares. They failed in the action, and were ordered to pay costs. Subsequently they brought an action for the administration of the estate. The executor was held entitled to set off the costs in the probate action against the legacies, notwithstanding the incumbrances. But see *Re Harrald*, 52 L. J. Ch. 436.

(*b*) *Whitaker* v. *Rush*, Ambl. 407; *Medlicot* v. *Bowes*, 1 Ves. Sen. 208; *Gale* v. *Luttrell*, 1 Younge & Jerv. 180; *ante*, pp. 1519, 1582. But in —— v. *Wood*, 2 P. Wms. 131, money lent and goods delivered by the executor to the legatee were held to be in part payment, and the Court said that the executor, if sued in equity for the legacy, might have insisted that the legatee had received so much of it by money and goods.

(*c*) It has been held in Ireland that the widow of an intestate entitled under the Intestates' Estates Act, 1890, to a charge of 500*l.* upon his real and personal estate has a sufficient interest in the real estate to entitle her to maintain an administration action: *McFinan* v. *McFinan*, [1897] 1 Ir. R. 66.

Court, 1883, dealing with originating summonses, will be found set out in the chapter on remedies for an executor in equity (*d*).

When a creditor can commence proceedings by summons.

A creditor is entitled to obtain an order for administration upon an originating summons, where the dispute as to his debt depends on a question of law, but not where his debt depends on disputed facts (*e*); in the latter case, he should commence proceedings by writ of summons.

Proceedings before probate or letters of administration granted must be by writ:

Ord. LV. r. 4, only authorizes an administration summons to be taken out by a creditor against executors, administrators, and trustees, and an originating summons taken out by a creditor against an executor before administration is entirely bad (*f*).

by annuitant:

An annuitant whose annuity is not in arrear, is not a creditor, and cannot apply for administration of the estate of the deceased, even although the estate of the deceased is not sufficient to pay the estimated value of the annuity as well as the other debts and liabilities (*g*).

Matters which can be decided on an originating summons.

There is only jurisdiction on an originating summons under Rules 3 and 4 of Ord. LV., to decide such matters as could have been decided in an administration suit, as, for instance, points relating to the administration of the estate and questions between executors and legatees, there is no jurisdiction on such a summons to decide questions as against persons claiming adversely to the estate (*h*), or questions as to legal devises or between legal devisees (*i*).

When the objection to the jurisdiction must be taken.

Unless the objection to the want of jurisdiction is taken in the Court below, it appears that the Court of Appeal will not entertain the objection (*k*), and the objection must be taken in Chambers or the defendant will not be allowed his costs of the adjournment into Court (*l*).

Ord. LV. r. 4a (R. S. C., October, 1899), provides that if, for the purposes of the Land Transfer Act, 1897, it is desirable to ascertain the heir-at-law or devisee or legatee of the person who has died, having real estate vested in him within the meaning

(*d*) See *ante*, pp. 1543, 1544.

(*e*) *Re Powers*, 30 C. D. 291, *post*, p. 1640.

(*f*) *Re Leask*, W. N. (1891) p. 159.

(*g*) *Re Hargreaves*, 44 C. D. 236.

(*h*) *Re Royle*, 43 C. D. 18; *Re Bridge*, 56 L. J. Ch. 779; *Re Gladstone*, W. N. (1888) p. 185.

(*i*) *Re Carlyon*, 56 L. J. Ch. 219; *Re Davies*, 38 C. D. 210. As to special applications by originating summons to determine questions of construction under a deed, Will, or other written instrument, see Ord. LIVA., R. S. C., November, 1893.

(*k*) *Re Turcan*, 58 L. J. Ch. 101.

(*l*) *Re Davies*, *supra*.

of that Act, the same may be ascertained and all necessary directions with regard to carrying out the provisions of that Act may be given on any originating summons taken out under Rules 3 or 4 of Ord. LV.

It would seem that an originating summons is not a proper proceeding on which to raise a question of breach of trust against trustees (*m*).

Determining a disputed debt on originating summons.

An originating summons should not be taken out to obtain payment of a disputed debt where the dispute turns on a matter of fact, but when the question depends merely on a question of law, it will be decided on an application by originating summons without putting the parties to another proceeding (*n*).

Notice of intention to raise Statute of Frauds.

Notice should be given of intention to raise, on the hearing of the summons, any question arising under the Statute of Frauds (*o*). The notice should be given by letter or affidavit.

Practice in an administration action.

In order to prevent inconvenient preference in the administration of the assets, as well as to avoid the burden which several suits by several creditors could not fail to bring on the fund to be administered, a Court of Equity always allowed a creditor to sue on behalf of himself and the other creditors of the deceased, and has thereupon directed a general account of the estate and debts to be taken against the executor or administrator (*p*), or, if assets were admitted, and the debt admitted or proved, has made an immediate decree for payment (*q*). But there is no actual necessity for a creditor to sue on behalf of himself and the other creditors as far as personal estate is concerned (*r*).

A creditor's action.

A legatee's action.

Upon the same principle a legatee has always been permitted

(*m*) Kekewich, J., in *Re Weall*, 37 W. R. 779. See Ann. Pr. 1904, p. 772; but see *Re Stuart*, 74 L. T. 546, *ante*, p. 1511. See also *Re Giles*, 43 C. D. 391, as to questions of priority between mortgagees.

(*n*) *Re Powers*, 30 C. D. 291, *ante*, p. 1639. See Ord. LV. r. 3, set out in the chapter on Remedies for an Executor in Equity, p. 1543.

(*o*) *Re Shearman*, 2 Times Rep. 236.

(*p*) Mitf. Pl. 5th edit. 193. A creditor having *debitum in præsenti solvendum in futuro* may maintain such a suit: *Whitmore* v. *Oxborrow*, 2 Y. & C. C. C. 13. And so may a claimant under a voluntary covenant: *Watson* v. *Parker*, 6 Beav. 283, note (*n*). After a decree in the suit, the executor cannot do any act to affect the relative rights of creditors: By Sir John Leach, M. R., in *Shewen* v. *Vandenhorst*, 2 Russ. & M. 75; 1 Russ. & M. 347, *S. C.*

(*q*) *Woodgate* v. *Field*, 2 Hare, 211.

(*r*) *Per* Jessel, M. R., *Re Greaves*, *Bray* v. *Tofield*, 18 C. D. at p. 554; *Re Blount*, 27 W. R. 865. See also *ante*, p. 1610.

to sue on behalf of himself and other legatees: and, even under the old practice, a bill has been admitted by a person claiming under a general description on behalf of himself and the other persons equally entitled under the same description (*s*).

Right of creditor suing on behalf of himself and other creditors to costs:

A creditor who sues *on behalf of himself and all other the creditors* is entitled where the estate proves insufficient for payment of debts, to costs, as between solicitor and client (*t*), and until it is decided that the use of the words is immaterial, it will be wise where a creditor is suing to use this particular form of words. The reason for the rule is thus stated by Kindersley, V.-C.: "If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and, therefore, if a creditor has, for the benefit of all the other creditors, instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro ratâ*, should be applied in payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only" (*u*).

It is sufficient, if it appears from the title of the statement of claim, that the creditor sues on behalf of all other creditors, although it does not appear on the writ, and the writ need not be amended (*x*). But it is not sufficient that the fact should appear merely in the body of the statement of claim; it should appear in the actual title (*y*).

or where he obtains conduct of action.

The rule applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin (*z*).

Practice where creditor seeks administration of the real estate.

Formerly, where a single creditor was seeking to have the real and personal estate of his deceased debtor administered, he had to sue "on behalf of himself and all other the creditors," if the debtor had died intestate or leaving a Will with no devise of real estate to trustees with power to sell and give

(*s*) Mitf. Pl. 5th edit. 194. The legatee of an annuity charged upon residue is entitled to administer: *Wollaston* v. *Wollaston*, 7 C. D. 58.

(*t*) *Re Richardson*, 14 C. D. 611; *Re McRea*, 32 C. D. 613.

(*u*) *Thomas* v. *Jones*, 1 Dr. & Sm. 134, 136; cited and approved of by Kay, J., in *Re McRea*, 32 C. D. 613, 615.

(*x*) *Eyre* v. *Cox*, 24 W. R. 137.

(*y*) *Re Tottenham* (1876), 1 Ch. 628.

(*z*) *Re Richardson*, 14 C. D. 611.

receipts (*a*). It is conceived, however, that, since the Land Transfer Act, 1897, this is no longer necessary in cases to which that Act applies.

Remedy in the County Court.

Creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next of kin, can bring actions against executors or administrators in the County Court for an account or administration.

Limit of jurisdiction in the County Court.

The jurisdiction of the County Court is, for this purpose, limited to cases, in which the personal or real, or personal and real estate, against or for an account or administration of which the demand may be made does not exceed in amount or value the sum of 500*l.* (*b*).

Execution of trusts.

The County Court has also jurisdiction in claims for the execution of trusts, in which the trust estate or fund does not exceed in amount or value 500*l.* (*c*).

Transfer from the Chancery Division to the County Court.

The Chancery Division has concurrent jurisdiction in the above matters with the County Court. Where an action is commenced in the Chancery Division which might have been commenced in the County Court, any of the parties can apply for its transfer to the County Court, and the Judge has power on such an application, or without such an application, to make an order transferring the action to the County Court, and thereupon the action proceeds in the County Court as if originally brought there (*d*). It has not been the practice to make such an order of transfer without special reason (*e*).

Staying proceedings in another action.

There is nothing to prevent other creditors or legatees from instituting a second action for administration; and as it is possible that, before the order, the litigating creditor may stop his action, the Court permits the actions to go on together until a decree in one of them is obtained (*f*). So, also, in the case of

(*a*) *Worraker* v. *Pryor*, 2 C. D. 109; *Re Doyle*, 5 C. D. 540. See also *Re Vincent*, 26 W. R. 94.

(*b*) 51 & 52 Vict. c. 43, s. 67, sub-s. 1.

(*c*) 51 & 52 Vict. c. 43, s. 67, sub-s. 2. In general the action must be commenced in the Court within the district of which any of the defendants dwell or carry on business, or live in, or in the Court of the district in which the defendants or one of them dwell or carried on business at any time within six calendar months next before the commencement of the action: 51 & 52 Vict. c. 43, s. 74; and Ann. County Courts Practice, 1904, pp. 76, 632. See further as to equitable remedies against executors and administrators in the County Court, *post*, Chap. IV. p. 1686.

(*d*) 51 & 52 Vict. c. 43, s. 69.

(*e*) *Picard* v. *Hine*, 18 L. T. 704.

(*f*) *Woodgate* v. *Field*, 2 Hare,

several persons claiming under the same general description. And when the usual order has been obtained in one of such actions, if another action is instituted, praying no further relief than might be had in the former action, the parties to such former action ought to apply to have the proceedings in the latter action transferred to the Judge in whose Court the proceedings under the decree are pending, and to have the second action stayed by him (*g*); otherwise the costs of it may be dealt with as costs in their action (*h*).

Question on applications to stay.

On the application to stay the proceedings, the question is, whether the action which is sought to be stayed asks something more than could be obtained under the existing order (*i*). As, for instance, where more complete and beneficial relief is sought or can be obtained in the second suit (*k*), or further questions are raised, such as wilful default or breaches of trust (*l*). Even where the second suit goes further than the first, proceedings in the second action have been stayed on the executor or administrator undertaking not to object to any additions to the decree in the first action which the Judge may think fit to add in chambers (*m*).

General practice.

The ordinary practice is to allow the action in which a decree has first been obtained to proceed and to stay the other action (*n*).

211, 214. As to staying proceedings in the other suits, see *Hawkes* v. *Barrett*, 5 Madd. 17; *Turner* v. *Dorgan*, 12 Sim. 504; *Reid* v. *Territt*, 1 Coll. 1; *Dryden* v. *Foster*, 6 Beav. 146; *Frowd* v. *Baker*, 4 Beav. 76; *Portarlington* v. *Damer*, 2 Phil. C. C. 262; *Duffort* v. *Arrowsmith*, 7 De G. M. & G. 434; *Harris* v. *Gandy*, 1 De G. F. & J. 13.

(*g*) As to applications to stay where one of the actions is in the Palatine Court, see *Re Williams*, W. N. (1882) p. 6; *Townsend* v. *Townsend*, 23 C. D. 100; *Wynne* v. *Hughes*, 26 Beav. 377; *Re Longdendale Cotton Co.*, 8 C. D. 150.

(*h*) *Therry* v. *Henderson*, 1 Y. & C. C. C. 481.

(*i*) *Rigby* v. *Strangways*, 2 Phil. C. C. 175; *Rump* v. *Greenhill*, 20 Beav. 512; *Plunkett* v. *Lewis*, 11 Sim. 379. See also *Suisse* v. *Lowther*, 2 Hare, 424; *Gwyer* v. *Peterson*, 26 Beav. 83; *Hoskins* v. *Campbell*, 2 Hemm. & Miller, 42; *Belcher* v. *Belcher*, 2 Dr. & Sm. 444.

(*k*) *Re McRae*, 25 C. D. 16; *Bulgen* v. *Saye*, 3 M. & Cr. 683; *Taylor* v. *Southgate*, 4 M. & Cr. 203; *Underwood* v. *Jee*, 1 Mac. & G. 276; *Pickford* v. *Hunter*, 5 Sim. 122.

(*l*) *Zambaco* v. *Cassavelli*, L. R. 11 Eq. 439.

(*m*) *Gwyer* v. *Peterson*, 26 Beav. 83; *Matthews* v. *Palmer*, 11 W. R. 610; *Van Bunan* v. *Piffard*, 13 W. R. 425.

(*n*) Seton, 6th edit. 835, 836.

Where the decree has been wrongly obtained.

If the decree has been "snapped," or unfairly obtained (*o*), or if the second action has been improperly instituted (*p*), the Court will either not stay the other action or will give the conduct of the action in which the decree has been made, to the plaintiff in the other action (*q*).

Conduct of the proceedings.

Where the first action is stayed because a decree has been made in a later action, the conduct of the second action will usually be given to the plaintiff in the first action (*r*); it makes no difference in this respect, that one of the actions is in the Palatine Court (*s*). The Court will, of course, depart from this rule, on the ground of the special circumstances of the case; for instance, where the Court comes to the conclusion that the object of the plaintiff in the first action is not the *bonâ fide* administration of the estate (*t*).

Partial stay.

In some cases the first action will be partially stayed, and liberty given to the plaintiff in the first action to prove in the second action for what he may eventually establish in the first (*u*).

Transfer of actions against executors or administrators where an administration order has been made.

Where an order has been made by any Judge of the Chancery Division, for the administration of the assets of any testator or intestate, the Judge in whose Court such administration is pending has power, without any further consent, to transfer to himself any cause or matter pending in any other Court or Division, brought or continued by or against the executors or administrators of the testator or intestate (*x*). In dealing with a creditor's action, when transferred to him, he will be governed by the same principles as formerly governed the Court in staying proceedings in such actions.

The application, how made.

The application for transfer of an action brought or continued against an executor or administrator, after an administration order, can be made *ex parte* by any party to either action (*y*).

(*o*) *Harris* v. *Gandy*, 1 D. F. & J. 13.

(*p*) *Frost* v. *Ward*, 2 D. J. & S. 70.

(*q*) *Rhodes* v. *Barret*, L. R. 12 Eq. 479.

(*r*) *Zambaco* v. *Cassavelli*, L. R. 11 Eq. 439; *Kenyon* v. *Kenyon*, 35 Beav. 300; *Belcher* v. *Belcher*, 2 Dr. & Sm. 444; *Frost* v. *Frost*, 2 D. J. & S. 70.

(*s*) *Re Swire*, 21 C. D. 647; *Townsend* v. *Townsend*, 23 C. D. 100.

(*t*) *Re Swire*, *supra*.

(*u*) *Dryden* v. *Foster*, 6 Beav. 146; *Re Smith's Estate*, 33 L. T. N. S. 804; *Crowe* v. *Russell*, 4 C. P. D. 186.

(*x*) R. S. C. 1883, Ord. XLIX. r. 5. For transfer in other cases, see Ord. XLIX.

(*y*) Ann. Pr. 1904, p. 672.

It must be made to the Judge who made the administration order (*z*).

This power of transfer takes the place of the old practice, which was, after a decree for administration had been made, for the Judge of the Court of Chancery making the administration decree, to restrain proceedings by other creditors against the executor or administrator by granting injunctions against such other creditors.

The action to be transferred must be one brought against the executor *quâ* executor, and not one for which the executor is personally liable (*a*).

Right of creditor bringing second action to costs.

The old practice was that a plaintiff at law was entitled, unless his claim proved unfounded (*b*), upon the injunction being granted, to his costs of the action up to the time when he had notice of the decree (*c*). And if the creditor commenced his action at law before bill filed, and then discontinued it, and came in under the decree, he would be entitled to prove his costs at law, in addition to his debt (*d*). He was also entitled to the costs of the motion to restrain him from suing at law (*e*). But he was not allowed the costs of further proceedings at law after actual notice of the decree (*f*), nor in such case his costs of the motion to restrain his proceedings (*g*). If, however,

(*z*) R. S. C. 1883, Ord. XLIX. r. 5.

(*a*) *Chapman* v. *Mason*, 40 L. T. N. S. 678. See also *Re Timms*, 26 W. R. 692.

(*b*) *King* v. *King*, 34 Beav. 10.

(*c*) *Dyer* v. *Kearsley*, 2 Meriv. 483, note to *Terrewest* v. *Featherby*; *Paxton* v. *Douglas*, 8 Ves. 520; *Ratcliffe* v. *Winch*, 16 Beav. 576. In *Drewry* v. *Thacker*, 3 Swanst. 541, Lord Eldon said that the usual form in which the order for the injunction was drawn (*i.e.*, "on payment of costs") was improper; inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the assets, be unable to obtain it in time.

(*d*) *Goate* v. *Fryer*, 3 Bro. C. C. 23.

(*e*) *Jones* v. *Jones*, 5 Sim. 678. But see *Anon.*, 2 Sim. & Stu. 424.

(*f*) *Paxton* v. *Douglas*, 8 Ves. 521; *Curre* v. *Bowyer*, 3 Madd. 456; *Jones* v. *Brain*, 2 Y. & C. C. C. 170.

(*g*) *Curre* v. *Bowyer*, 3 Madd. 456; *Jones* v. *Brain*, 2 Y. & C. C. C. 170. See *Hayward* v. *Constable*, 2 Y. & Coll. 43; *Moore* v. *Prior*, *ibid.* 375. He may be ordered to pay these costs, if, after bringing in his claim under the decree, he proceeds with his own suit: *Beauchamp* v. *Lord Huntley*, Jacob, 546; *Gardner* v. *Garrett*, 20 Beav. 469: notwithstanding the suit be in a foreign Court: *Graham* v. *Maxwell*, 1 Mac. & G. 71. He may set off such costs against his costs incurred before notice of the decree: 20 Beav. 469.

the executor took any steps in the action after the plaintiff at law had notice of the decree, the latter would be allowed all his costs at law and also those of the motion for the injunction (*h*). The practice is now substantially the same as before the Judicature Acts (*i*).

Time for application.

With respect to the time within which the injunction should be applied for, it was observed by Lord Lyndhurst (*k*), that any delay in the application before judgment would, in most cases, properly resolve itself into a mere question of costs.

Transfer to bankruptcy.

By sect. 125, sub-sect. 4, of the Bankruptcy Act, 1883, where proceedings have been commenced in any Court for the administration of the estate of a deceased debtor, such Court can, on proof that the estate is insolvent, transfer the proceedings to the Court of Bankruptcy.

The transfer can be made either on the application of a creditor (*l*), or without any such application (*m*).

A creditor before applying for the transfer of an insolvent estate into bankruptcy must, it would appear, have proved his debt (*n*).

The transfer can be ordered after a judgment for administration has been made (*o*).

Transfer discretionary.

The exercise of this power of transfer is discretionary (*p*), and the mere fact that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which rights would be recognized in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer (*q*).

An order for administration cannot be made in the

An estate cannot be administered in a Court of Equity in the absence of a personal representative (*r*). And, consequently, if

(*h*) *Turner* v. *Connor*, 15 Sim. 630.

(*i*) See R. S. C. Ord. XLIX. r. 5; Morgan and Wurtzburg on Costs, 2nd edit. p. 192; Dan. Ch. Pr. 7th edit. 1663.

(*k*) *Rouse* v. *Jones*, 1 Phil. Ch. C. 464.

(*l*) 46 & 47 Vict. c. 52, s. 125, sub-s. 4.

(*m*) 53 & 54 Vict. c. 71, s. 21, sub-s. 2 (Bankruptcy Act, 1890).

(*n*) *Re Weaver*, 29 C. D. 236.

(*o*) *Re York*, 36 C. D. 233; *Senhouse* v. *Mawson*, 52 L. T. N. S. 745; *Re Briggs*, 7 Times Rep. 572.

(*p*) *Re Baker*, 44 C. D. 262; *Re Weaver*, 29 C. D. 236.

(*q*) *Re Baker*, *supra*. But see *Re York*, 36 C. D. 233. And see *Re Rhoades*, [1899] 2 Q. B. 347.

(*r*) *Lowry* v. *Fulton*, 9 Sim. 104; *Dowdeswell* v. *Dowdeswell*, 9 C. D. 294.

it appear that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court (*s*). Accordingly, on a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix deceased, it was held by Lord Cottenham, C., that an allegation that all the testator's debts and the other legacies bequeathed by his Will had been paid, and that there were assets *ultra* in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator, the allegation being one which, even if admitted by the defendant, the Court would not take his word for (*t*).

absence of a personal representative of the deceased.

In *Glass* v. *Oxenham* (*u*), it was held that if a bill were brought against an executor, during whose infancy the Will appointed an executor *durante minore ætate*, the latter must be made a party, unless the former had received all the testator's personal estate from the hands of the temporary executor, upon an account between them.

In *Holland* v. *Prior* (*x*), it was held, by Lord Brougham, overruling the decision of Sir L. Shadwell, V.-C., that the executor of an administratrix, who had received assets of her intestate, might and ought to be made a defendant in a suit instituted by a creditor of the intestate. And in *Hall* v. *Austin* (*y*), Knight Bruce, V.-C., appears to have acceded to the proposition that, as a general rule, where there are several executors who have acted and one of them dies before any suit is instituted, a person interested in the administration of the estate cannot file a bill for the general administration of the estate, making the surviving executors alone parties.

Where the executor of a deceased personal representative is a necessary party.

It is necessary to join the representative of a deceased executor if a general account of the trust estate, on the footing of wilful neglect and default, is required (*z*).

The representative of a deceased executor must be joined where wilful default alleged.

(*s*) *Penny* v. *Watts*, 2 Phil. Ch. C. 153; *Cary* v. *Hills*, L. R. 15 Eq. 79; *Rowsell* v. *Morris*, L. R. 17 Eq. 20. But see *contra*, *Rayner* v. *Koehler*, L. R. 14 Eq. 262; *Coote* v. *Whittington*, L. R. 16 Eq. 536; *Re Lovett*, 3 C. D. 198.

(*t*) *Penny* v. *Watts*, 2 Phil. Ch. C 149.

(*u*) 2 Atk. 121.

(*x*) 1 M. & K. 237. See also *Hall* v. *Austin*, 2 Coll. 570.

(*y*) 2 Coll. 570. See also *Coppard* v. *Allen*, 2 D. J. & S. 173. But see *Masters* v. *Barnes*, 2 Y. & C. C. C. 616.

(*z*) *Coppard* v. *Allen*, 2 D. J. & S. 173.

The representative of a deceased executor need not be joined in an administration action, if it is not sought to charge the estate of the deceased executor (*a*), or if an account is waived as against his estate (*b*). The old form of pleading, where the representatives of a deceased executor were not joined, was to allege that the deceased executor, or his representative, had duly accounted to the surviving executors (*c*); but such an allegation appears to have been unnecessary (*d*), and under the present procedure, as the bulk of administrations are without pleadings, there would be no opportunity of making such an allegation.

Administrator of deceased executor and executor *de son tort* not sufficient.

The administrator of a deceased executor does not sufficiently represent the estate of which his intestate was executor for the purpose of making an administration decree (*e*), and the better opinion seems to be that an executor *de son tort* alone is not sufficient (*f*).

Where fund converted or specially appropriated.

If, indeed, an executor or administrator has so dealt with a fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of residue, and has assumed the character of a trust fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property of, the *cestui que trust*,—it may not be necessary that the *cestui que trust* should bring before the Court the personal representative of the testator in a suit to recover that part of the estate (*g*).

Foreign executor, &c.

There has already been occasion to point out that in cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the Probate Court in this country (*h*).

(*a*) For form of such a decree, see Seton, 6th edit. p. 1521.

(*b*) *Masters* v. *Barnes*, 2 Y. & C. C. C. 616.

(*c*) *Adams* v. *Barry*, 2 Y. & C. C. C. 167.

(*d*) *Wilson* v. *Todd*, 1 M. & Cr. 42.

(*e*) *Barber* v. *Walker*, 15 W. R. 728.

(*f*) *Rowsell* v. *Morris*, L. R. 17 Eq. 20. But see *contra*, *Re Lovett*, 3 C. D. 198; *Rayner* v. *Koehler*, L. R. 14 Eq. 262; *Coote* v. *Whittington*, L. R. 16 Eq. 534; *Blewitt* v. *Blewitt*, Yo. 541.

(*g*) *Bond* v. *Graham*, 1 Hare, 482, 484. See also *Arthur* v. *Hughes*, 4 Beav. 506; and Lord Cottenham's judgment in *Penny* v. *Watts*, 2 Phil. Ch. C. 153, 154. But see *Rayner* v. *Koehler*, L. R. 14 Eq. 262; *Coote* v. *Whittington*, L. R. 16 Eq. 534.

(*h*) *Ante*, p. 269 *et seq.* In

Administrator *ad litem* not sufficient.

Where there is no general personal representative, but a special representative limited to the subject of the suit has been appointed by the Probate Court, the limited administrator does not sufficiently represent the estate of the deceased where a general administration is required (*i*).

Until decree the plaintiff is *dominus litis.*

After the usual administration judgment or order, every creditor has an interest in the suit (*k*), and is in a sense, deemed to be before the Court; yet, until such order, the plaintiff is *dominus litis*, so that he may deal with the action as he pleases; and he may settle the matter with the executor, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings (*l*). And indeed the Court will compel the creditor to accept payment of his debt, when the executor offers to pay it with the costs of the action (*m*).

Who may be made co-defendants

The general rule is, that, inasmuch as the executor or administrator is the trustee and proper representative of all persons

Anderson v. *Caunter*, 2 M. & K. 763, A., one of the executors of the Will of B., who died in India, proved the Will, and possessed the testator's assets in India. The widow and executrix of A. proved her husband's Will, and possessed his assets in India, and, having afterwards come to England, she was made a party to a suit for the administration of B.'s estate; and Sir J. Leach, M. R., held that it was not necessary that an administrator of A.'s estate in England should be also a party to this suit. But see the observations of Lord Cottenham on this decision in *Tyler* v. *Bell*, 2 M. & Cr. 89, 110. See also Story's Confl. of Laws, ch. xiii. s. 513, note (1), where it is said that *Anderson* v. *Caunter* seems not a sound authority: *Maclean* v. *Dawson*, 27 Beav. 21; *Flood* v. *Patterson*, 29 Beav. 295.

(*i*) See *ante*, p. 416, note (*c*); *Dowdeswell* v. *Dowdeswell*, 9 C. D. 294.

(*k*) See *Sterndale* v. *Hankinson*, 1 Sim. 399, 400; *Cook* v. *Bolton*, 5 Russ. 282; *Brown* v. *Lake*, 2 Coll. 620; *Smith* v. *Guy*, 2 Phil. Ch. C. 159. But see *Re Greaves*, 18 C. D. 551. It would appear that under the old practice only creditors whose debts were due at the death of the testator were in strictness permitted to come in under the decree; the present practice is to admit all creditors to come in whose debts have become due before the date of the report: *Thomas* v. *Griffith*, 2 De G. F. & J. 555, *per* Turner, L. J. It seems also that where an account of debts has been ordered to be taken, all persons having any demands upon the estate in respect of any liabilities, whether certain or contingent, should send in claims: Dan. Ch. Pr. 7th edit. pp. 831, 832, and cases cited.

(*l*) *Woodgate* v. *Field*, 2 Hare, 213; *Wood* v. *Westall*, 1 Younge, 305.

(*m*) *Woodgate* v. *Field*, 2 Hare, 213; *Pemberton* v. *Topham*, 1 Beav. 316; *Holden* v. *Kynaston*, 2 Beav. 204.

with executors, &c.

interested in the personal estate, and has the duty cast on him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or a residuary legatee, or the next of kin, as a party to an action against the executor or administrator for an account of the personal estate, however interested such persons may be to contest the demand which has occasioned the suit (*n*). Special circumstances, however, have been permitted to justify the relaxation of this rule (*o*).

Persons wrongfully taking the dead man's property.

Again, the established rule is, that in ordinary cases, persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to an action against the executor: For regularly there can be no action against the debtor but by the executor, who has the right both at law and in equity: If the executor be solvent he may even release a debtor, and neither a creditor nor a residuary legatee can bring any action against that debtor: There must be collusion or insolvency, or some special case: The Court will interfere, if there is such special case: as collusion or insolvency; and then the action may be brought against both the debtor and the executor (*p*). And the general principle on which a debtor to the estate cannot be made a defendant to an action by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case be shown, has been held to apply equally to the case of a creditor overpaid by the executor: that is, if there is no collusion or special case, if the executor is not insolvent, he stands the middle man, responsible for the property misapplied by paying a man as a creditor who was not a creditor, as in the other case for the property outstanding in a debtor (*q*).

(*n*) *Brown* v. *Dowthwaite*, 1 Madd. 446.

(*o*) *Lord Hertford* v. *Zichi*, 9 Beav. 11. And see R. S. C. Ord. XVI. r. 8.

(*p*) *Newland* v. *Champion*, 1 Ves. Sen. 105; *Utterson* v. *Mair*, 2 Ves. 95; *Doran* v. *Simpson*, 4 Ves. 651; *Troughton* v. *Binkes*, 6 Ves. 573; *Alsager* v. *Rowley*, 6 Ves. 748; *Beckley* v. *Dorrington*, cited by Lord Eldon, *ibid.* 749; *Benfield* v. *Solomons*, 9 Ves. 86; *Burroughs* v. *Elton*, 11 Ves. 29; *Consett* v. *Bell*, 1 Y. & C. C. C. 569; *Lancaster* v. *Evors*, 4 Beav. 158; *Baddeley* v. *Curwen*, 2 Coll. 151; *Barker* v. *Birch*, 1 De G. & Sm. 376. As to whether a refusal by the executor to sue the debtor is sufficient, see the case last cited. The special circumstances which will authorise making the debtor a party are not confined to collusion or insolvency: *Meldrum* v. *Scorer*, 56 L. T. 471; *Consett* v. *Bell*, 1 Y. & C. C. C. 569; 1 De G. & Sm. 376; *Stainton* v. *Carron Co.*, 11 Beav. 146; *Saunders* v. *Druce*, 3 Drew. 140.

(*q*) *Alsager* v. *Rowley*, 6 Ves. 748.

Surviving partners of deceased.

But this rule has been relaxed in the case of surviving partners of the deceased: whom it is allowable to make parties with the executor: in order, it is said, that the plaintiff may have an account of the personal estate entire (*r*). Accordingly, in *Bowsher* v. *Watkins* (*s*), it was held by Sir John Leach, M. R., that residuary legatees might maintain a bill for an account against the executor and the surviving partner of the testator, although collusion between the executor and the surviving partner was neither charged nor proved (*t*). But upon the examination of the authorities (*u*), it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases seem to go to this extent,—that such an action may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution of the rights of the parties interested in the estate against the surviving partners (*x*).

(*r*) *Newland* v. *Champion*, 1 Ves. Sen. 106, by Lord Hardwicke.

(*s*) 1 Russ. & M. 277.

(*t*) His Honor, in the previous case of *Gedge* v. *Traill*, 1 Russ. & M. 281, note, overruled a demurrer to a creditor's bill, which had made the co-partners of the deceased testator co-defendants with his executor, upon the ground that the retaining of assets by a stranger with consent of the executor amounted to collusion. In *Davies* v. *Davies*, 2 Keen, 534, Lord Langdale, M. R., said that the decision of *Bowsher* v. *Watkins* is far from establishing the general proposition that in every case a bill may be filed against an executor and a surviving partner of the testator, without charging and proving fraud or collusion. See also *Law* v. *Law*, 2 Coll. 41; *Cropper* v. *Knapman*, 2 Y. & Coll. 338.

(*u*) *Bowsher* v. *Watkins*, 1 Russ. & M. 277; *Gedge* v. *Traill*, 1 Russ. & M. 281; *Davies* v. *Davies*, 2 Keen, 534; *Law* v. *Law*, 2 Coll. 41; *Cropper* v. *Knapman*, 2 Y. & Coll. 338; commented on in *Yeatman* v. *Yeatman*, 7 C. D. 210; *Beningfield* v. *Baxter*, 12 App. Cas. 167.

(*x*) *Travis* v. *Milne*, 9 Hare, 141, 150, by Turner, V.-C. In *Stainton* v. *Carron Co.*, 18 Beav. 146, Romilly, M. R., approved of this statement of the general principle, and held that it did not apply to such a partnership as a joint stock company. See also *Yeatman* v. *Yeatman*, 7 C. D. 210. When a member of a partnership dies insolvent, and an order is made under sect. 125 of the Bankruptcy Act, 1883, for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the Court has jurisdiction to direct the proceedings in the two estates to be consolidated: *Re Greaves*, [1904] 2 K. B. 493.

Refusal of personal representative to sue.

The mere refusal of a legal personal representative to sue for the recovery of outstanding assets, is not, in the absence of special circumstances, sufficient to justify a residuary legatee or next of kin, in suing the legal personal representative and the alleged debtor to the estate (*y*).

Following assets.

Where an executor has administered assets and paid over the residue of an estate, a creditor of the testator is entitled to follow the residue and to compel payment from the residuary legatee of his debt, so far as the residue will extend, and the executor need not be a defendant to the action (*z*).

Death of one of several co-plaintiffs in a creditor's action.

The death of one of several co-plaintiffs in a creditor's suit did not under the old practice cause the suit to abate (*a*), but his personal representatives could obtain an order of revivor if the dead creditor represented a different class of creditors from that represented by his co-plaintiff, at any rate if the dead plaintiff died after decree (*b*). So now under the Judicature Act the action will not abate, by reason of Ord. XVII. r. 1, and any necessary parties may be added under Rule 4 of the same Order.

Binding absent persons.

Although it has been the practice of the Court in administration actions to entertain actions by creditors, legatees, and parties entitled in distribution on behalf of themselves and all others, and to exonerate the executor or administrator for payment of assets pursuant to its order, yet such a decree is not absolutely binding upon the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims (*c*), and have been guilty of no laches (*d*). Although such creditors have no remedy against the executor or administrator, yet they have a right to assert their claim against the creditors, legatee or distributees who have received it (*e*).

When the interests of persons not

It is important to understand how the interests of persons affected by an account or inquiry directed in an administration

(*y*) *Yeatman* v. *Yeatman*, 7 C. D. 210.

(*z*) *Hunter* v. *Young*, 4 Ex. D. 256. See also *Clegg* v. *Rowland*, L. R. 3 Eq. 368.

(*a*) *Body* v. *Kent*, 1 Mer. 364; *Burney* v. *Morgan*, 1 Sim. & Stu. 358.

(*b*) *Burney* v. *Morgan*, *supra*.

(*c*) *David* v. *Frowd*, 1 Mylne & K. 200. See *Anon.*, 9 Price, 210.

(*d*) *Sawyer* v. *Birchmore*, 1 Keen, 391; *S. C.*, 2 M. & Cr. 611. See also *Cattell* v. *Simons*, 8 Beav. 143.

(*e*) Story on Equity Plead. Ch. iv. s. 106. An executor suing on behalf of himself and all other creditors can none the less retain his own debt: *Ex parte Campbell*, 16 C. D. 198.

action may be bound when they are not actually parties to the action.

parties to the action are bound by it.

There seem to be four ways in which such interests will be bound:—

1. The Court can, under Ord. XVI. r. 40, direct that such persons shall be served with notice of the judgment or order.

After such notice the persons served are bound by the proceedings, in the same manner as if they had originally been parties, and are at liberty to attend the proceedings (*f*) upon entering an appearance in the Central Office in the same manner as a defendant entering an appearance (*g*). Any person so served may, within one month after such service, apply to the Court or a Judge to discharge, vary or add to the judgment or order (*h*).

Numerous persons having the same interest.

2. "Where there are numerous parties having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested" (*i*). If an order made in such an action is intended to bind absent parties the Court will make a "representation order" in the form "it appearing that the residuary legatees (or whatever the class may be) are numerous, and that A. is one of such class, order that A. do defend in the cause (or matter) on behalf or for the benefit of all persons so interested" (*k*).

Claim for a representation order:

Where a representation order is required the writ must be indorsed in accordance with Ord. III. r. 4, and show that the plaintiff sues or the defendant is sued in a representative capacity (*l*).

"If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity . . . he shall deny the same specifically" (*m*).

(*f*) Ord. XVI. r. 40.

(*g*) Ord. XVI. r. 41.

(*h*) Ord. XVI. r. 40.

(*i*) R. S. C. Ord. XVI. r. 9.

(*k*) See judgment of Kay, J., in *May* v. *Newton*, 34 C. D. 347, where the whole subject is very fully discussed.

(*l*) "If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show . . . . in what capacity the plaintiff or defendant sues or is sued": R. S. C. Ord. III. r. 4. See forms in Appendix A. Part III. Sect. VII. to R. S. C.

(*m*) R. S. C. Ord. XXI. r. 5.

representative of a class.

3. "In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court or Judge shall consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before such heir-at-law, next of kin or class, shall have been ascertained by means of inquiry, or otherwise, the Court or a Judge may appoint some one or more persons to represent such heir-at-law, next of kin or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin or class, so represented (*n*).

Trustees, executors, &c., may sue and be sued as representing estate.

4. "Trustees, executors, and administrators, may sue and be sued on behalf of, or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties" (*o*).

It is obvious, however, that where the trustees, executors, or administrators, are the accounting parties, and the question is one of accounts, they do not sufficiently represent the estate to bind absent parties (*p*).

Costs of persons appearing under a representation order.

In the case of *Re Davies* (*q*), Kekewich, J., held that he had power to give costs, as between solicitor and client, to persons not actually parties to the proceedings, but only there by virtue of a representation order under Ord. XVI. r. 32.

A residuary legatee; a next of kin; a legatee interested in a legacy charged upon real estate; a person interested in the proceeds of real estate directed to be sold; or a residuary devisee, or heir; if entitled to a judgment or order for administration of the estate of a deceased, may have the same without serving the other persons interested (*r*), subject to the right of

(*n*) R. S. C. Ord. XVI. r. 32; *ante*, p. 1546.

(*o*) R. S. C. Ord. XVI. r. 8.

(*p*) See Kay, J., in *May* v. *Newton*, 34 C. D. 349.

(*q*) W. N. (1891), p. 104; 64 L. T. 824.

(*r*) Ord. XVI. rr. 33—35; *ante*, pp. 1546, 1547.

the Court to require any other to be made a party (*s*); but it appears that an order made in such case will not be binding on other beneficiaries unless they are served with it under Ord. XVI. r. 40 (*t*), or a representation order has been made (*u*).

Defence: Statute of Limitations.

Although suits in equity are not within the words of the Statute of Limitations, 21 Jac. I. c. 16, yet they are within the spirit and meaning of it; and, therefore, upon all *legal* demands, the Courts of Equity are *bound* to yield obedience to its provisions (*x*); and as Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years by analogy to that statute (*y*).

Effect of a trust for creditors or beneficiaries.

Subject to the provisions of the Trustee Act, 1888, the Statute of Limitations (21 Jac. I. c. 16) does not run against a trust (*z*). Accordingly, a trust created by Will upon the *real* estate for the payment of debts, prevents the statute from running against such debts as were not barred in the testator's lifetime (*a*),

(*s*) Ord. XVI. r. 39; *ante*, p. 1547.

(*t*) *Ante*, p. 1547.

(*u*) See *May* v. *Newton*, *supra*.

(*x*) *Hovenden* v. *Annesley*, 2 Scho. & Lef. 630, 631; *Foley* v. *Hill*, 1 Phil. Ch. C. 399; *Burdick* v. *Garrick*, L. R. 5 Ch. 233, 240; *Re Greaves*, 18 C. D. 551, 554; *Re Sharpe*, [1892] 1 Ch. 154; *Re Bennett*, *ibid.*

(*y*) *Re Greaves*, *supra*. In *Tatam* v. *Williams*, 3 Hare, 357, a bill by surviving partners against the executors of a partner, who died thirteen years before the institution of the suit, for an account of his partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by Wigram, V.-C., with costs, on the ground of lapse of time. Again, in *Baker* v. *Read*, 18 Beav. 398, where a bill had been filed after seventeen years to set aside a purchase of the testator's estate by his executor at an undervalue, Romilly, M. R., refused relief, although his Honour added that if the transaction had been fresh, he should have set it aside without a moment's hesitation. See further as to *laches* and lapse of time being a bar in equity, *Portlock* v. *Gardner*, 1 Hare, 594; *Browne* v. *Cross*, 14 Beav. 105; *Sibbering* v. *Balcarras*, 3 De G. & Sm. 735; *Wright* v. *Vanderplank*, 2 K. & J. 1; *Aspland* v. *Watte*, 20 Beav. 474; *Mills* v. *Drewitt*, 20 Beav. 632; *Hartwell* v. *Colvin*, 16 Beav. 140; *Bullock* v. *Downes*, 9 H. L. C. 1; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 210.

(*z*) *Hollis's Case*, 2 Ventr. 345; *Hargreaves* v. *Michell*, 6 Madd. 326; *Barker* v. *Martin*, 5 Sim. 380; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; *Dickenson* v. *Lord Holland*, 2 Beav. 310; *Obee* v. *Bishop*, 1 De G. F. & J. 137; *Brittlebank* v. *Goodwin*, L. R. 5 Eq. 545; *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514.

(*a*) *Burke* v. *Jones*, 2 V. & B. 275; *Hughes* v. *Wynne*, 1 Turn. & R. 307; *Hargreaves* v. *Michell*, 6 Madd. 326.

though a mere charge is not sufficient for this purpose (*b*). Such a trust does not, however, revive a debt on which the statute had taken effect before the Will came into operation, viz., before the testator's death (*c*). But a trust or charge by Will upon the *personal* estate does not prevent the operation of the Statute of Limitations: For the law vests the personal estate of the deceased in his executors or administrators, as a fund for the payment of his debts, and he cannot, by his Will, create a special trust for that purpose: Consequently, such a trust has no legal operation (*d*). It would seem that the same principle would now apply in the case of such real estate of a testator, dying since the Land Transfer Act, 1897 came into operation, as becomes vested, under sect. 1 of that Act, in his personal representatives as if it were a chattel real, and which under sect. 2 (3) becomes liable for payment of his debts as if it were personal estate, although the order in which his real and personal assets are applicable towards their payment is not affected by the Act (*e*). Where a testator, dying before the operation of the last-mentioned Act, directed his debts to be paid out of his real and personal estate, and afterwards provided that, if his personal estate should fall short in paying his debts, his executors should have power to enter into the receipt of the rents of his freehold, until the same should be wholly paid off; it was held that, notwithstanding the personal estate was sufficient for payment of the debts, a trust had been created for payment of the debts out of his realty, so as to prevent the operation of the Statute of Limitations; and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate (*f*).

(*b*) *Dickinson* v. *Teasdale*, 1 D. J. & S. 52; *Jacquet* v. *Jacquet*, 27 Beav. 332; *Cunningham* v. *Foot*, 3 App. Cas. 974.

(*c*) *Burke* v. *Jones*, 2 V. & B. 275; *Hargreaves* v. *Michell*, 6 Madd. 326; *O'Connor* v. *Haslam*, 5 H. L. C. 170.

(*d*) *Scott* v. *Jones*, 4 Cl. & F. 382, in which case the House of Lords affirmed the judgment of Sir John Leach, and reversed that of Lord Brougham, 1 Russ. & M. 255. See also accord. *Freake* v. *Cranefeldt*, 3 M. & Cr. 499; *Evans* v. *Tweedy*, 1 Beav. 55.

(*e*) 60 & 61 Vict. c. 65; *ante*, p. 1275.

(*f*) *Crallan* v. *Oulton*, 3 Beav. 1; *Moore* v. *Petchell*, 22 Beav. 172. Where executors in whom the legal estate is vested under their testator's Will are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain

Real Property Limitation Act, 1874.

By the Real Property Limitation Act, 1874 (*g*), s. 8, it is enacted that after the 1st January, 1879, "no action or suit, or *other proceeding* shall be brought to recover any sum of money secured by any mortgage, judgment (*h*), or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, *or any legacy* (*i*), but within twelve years next after a

unpaid, unless twenty years have elapsed from the testator's decease, but after twenty years he should make such inquiry: *Sabin* v. *Heape*, 27 Beav. 533; *Re Tanqueray-Willaume and Landau*, 20 C. D. 465. And the same principle would no doubt be applicable to the case of executors selling under the powers of the Land Transfer Act, 1897. For the rule as to leaseholds, see *Re Whistler*, 35 C. D. 561; *Re Venn and Furze*, [1894] 2 Ch. 101; *Re Verrell*, [1903] 1 Ch. 65. And see *ante*, p. 702.

(*g*) 37 & 38 Vict. c. 57.

(*h*) See *Watson* v. *Birch*, 15 Sim. 523. This section applies to judgments generally, and is not restricted to judgments which operate as charges on land: *Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124; *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, affirmed in C. A. [1893] 1 Q. B. 189.

(*i*) Sect. 40 of the statute 3 & 4 Will. IV. c. 27, which corresponded to the above provision was held to apply to legacies payable out of personal estate as well as to legacies charged on real estate: *Sheppard* v. *Duke*, 9 Sim. 567; *Bullock* v. *Downes*, 9 H. L. C. 1, 14. A residue bequeathed by Will is clearly within the statute: *Prior* v. *Horniblow*, 2 Y. & Coll. 200; *Christian* v. *Devereux*, 12 Sim. 264; *Portlock* v. *Gardner*, 1 Hare, 594, 604; *Adams* v. *Barry*, 2 Coll. 285, 290, 293. But where more than twenty years after the death of the testator, the representative of one of his executors, and the residuary legatee under his Will, filed a bill against the representative of the co-executor to recover residuary assets of the testator, alleged to have been possessed by the co-executor; it was held that the plaintiffs, though barred by the statute as to assets possessed by the executor more than twenty years before the filing of the bill, were not so barred as to assets possessed by him since that time: *Adams* v. *Barry*, 2 Coll. 290. See also *Bright* v. *Larcher*, 27 Beav. 130; 4 De G. & J. 608, *S. C.* And see also *Re Johnson*, 29 C. D. 964. Where the right to sue for the legacy as such was barred by the statute, but the executor, who had possessed assets to pay it, died leaving it unpaid, and having charged his estate with his debts, it was held that the legacy could not be claimed under the charge of debts: *Piggott* v. *Jefferson*, 12 Sim. 26.

A suit to recover a legacy from an executor is within sect. 8 of the Real Property Limitation Act, 1874, unless the legacy is vested in him on express trusts. A mere constructive trust by implication from his office will not prevent the statute from being a bar: *Re Davis*, [1891] 3 Ch. 119; *Re Lacy*, [1899] 2 Ch. 149. See also *Re Barker*, [1892] 2 Ch. 491. And cf., *ante*, p. 1610.

present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment (*k*) of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given" (*l*).

Money or legacy charged upon land or rent. 37 & 38 Vict. c. 57, s. 10.

By sect. 10 of the Real Property Limitation Act, 1874: "After the commencement of this Act no action, suit, or other proceeding, shall be brought to recover any sum of money or legacy charged upon, or payable out of any land or rent, at law or in equity, and secured by an express trust (*m*), or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust."

36 & 37 Vict. c. 66, s. 25 (2). Claims by *cestui que trust* against trustee.

But by sect. 25 (2) of the Judicature Act, 1873: "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations" (*n*).

These two sections seem to be inconsistent; but the construction which has been placed upon them is, that the first section applies as between the land charged and the *cestui que trust*, whilst the second one applies as between the trustee and *cestui que trust* (*o*).

(*k*) See *Holland* v. *Clark*, 1 Y. & C. C. C. 151, as to what is a sufficient acknowledgment. See also *Lord St. John* v. *Boughton*, 9 Sim. 219; *Taylor* v. *Holland*, [1902] 1 K. B. 676.

(*l*) The 40th section of the 3 & 4 Will. IV. c. 27, did not extend to the case of intestacy, but the section was extended to intestacies by sect. 13 of the 23 & 24 Vict. c. 38. By a strange omission, sect. 8 of the 37 & 38 Vict. c. 57, does not extend to intestacies, the result being that legatees are barred by the latter Act after twelve years, and persons claiming under an intestacy will still only be barred by the 23 & 24 Vict. c. 38, after twenty years.

(*m*) *Williams* v. *Williams*, [1900] 1 Ch. 152.

(*n*) See *Re Davis*, [1891] 3 Ch. 119.

(*o*) See *Sutton* v. *Sutton*, 22 C. D. 511; *Fearnside* v. *Flint*, 22 C. D. 579; *Hughes* v. *Coles*, 27 C. D. 231; Lewin on Trusts, 10th edit. pp. 1059—1079.

By sect. 25 of the 3 & 4 Will. IV. c. 27, "When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

Claims on a trust of land or rent. 3 & 4 Will. IV. c. 27, s. 25.

The benefit of this section is extended to personal estate by virtue of sect. 25, sub-s. 2, of the Judicature Act, 1873.

By sect. 42 of the 3 & 4 Will. IV. c. 27, "After the 31st December, 1833, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, *or in respect of any legacy* (*p*), or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment (*q*) of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years" (*r*).

3 & 4 Will. IV. c. 27, s. 42.

In the construction of the last-mentioned statute, it was held, that an action to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain

Fund severed from the general estate.

(*p*) An annuity given by a Will, forming no charge upon land, but being personal only, is not within this enactment: *Roch* v. *Callen*, 6 Hare, 531; *Re Ashwell's Will*, Johns. 112.

(*q*) See note (*k*), *supra*.

(*r*) See *Cunningham* v. *Foot*, 3 App. Cas. 974.

trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the Will, so that the fund had ceased to bear the character of a legacy, and had assumed that of a trust fund, must be considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and therefore that it was not within the terms of the Act: And in *Watson* v. *Saul* (*s*), Wood, V.-C., observed, that the distinction between mere charges and express trusts pointed out by Lord Eldon in *King* v. *Denison* (*t*), was the foundation upon which sect. 40 of 3 & 4 Will. IV. c. 27 (see now sect. 8 of Real Property Limitation Act, 1874) rested, and that the provisions of that section were never intended to apply to cases of express trusts (*u*). In the case of *Re Blachford* (*x*), Pearson, J., allowed legatees, who had waited for payment of their legacies until a reversionary interest had fallen in, interest on their legacies from one year after the death of the testatrix, such interest largely exceeding six years' arrears.

(*s*) 1 Giff. 188, 196. See also *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176.

(*t*) 1 Ves. & B. 260.

(*u*) *Phillipo* v. *Munnings*, 2 Mylne & Cr. 309. See also accord. *Dinsdale* v. *Dudding*, 1 Y. & C. C. C. 265; *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jones & L. 182, 196, *per* Sugden, C. of Ireland; *Jacquet* v. *Jacquet*, 27 Beav. 332; *Snow* v. *Booth*, 2 K. & J. 132; *Burrowes* v. *Gore*, 6 H. L. C. 907; *Dickinson* v. *Teasdale*, 31 Beav. 511; *Proud* v. *Proud*, 32 Beav. 234; *Thomson* v. *Eastwood*, 2 App. Cas. 216. See further as to the statute running against trusts: *Ravenscroft* v. *Frisby*, 1 Coll. 16; *Lord St. John* v. *Boughton*, 9 Sim. 219. See also *Roch* v. *Callen*, 6 Hare, 531, 536; *Young* v. *Lord Waterpark*, 13 Sim. 199, 204; *Gough* v. *Bult*, 16 Sim. 323; *Playfair* v. *Cooper*, 17 Beav. 187; *Lord Brougham* v. *Lord William Poulett*, 19 Beav. 119, 134; *Dix* v. *Burford*, 19 Beav. 409, 412. See likewise *Francis* v. *Grover*, 5 Hare, 39; *Hughes* v. *Williams*, 3 Mac. & G. 683; *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Cox* v. *Dolman*, 2 De G. M. & G. 592; *Snow* v. *Booth*, 2 K. & J. 132; *Davenport* v. *Stafford*, 14 Beav. 319, 331; *Bullock* v. *Downes*, 9 H. L. C. 1; *Smith* v. *Acton*, 26 Beav. 210; *Lewis* v. *Duncombe*, 29 Beav. 175; *Round* v. *Bell*, 30 Beav. 121; *Tyson* v. *Jackson*, 30 Beav. 384; *Hodgson* v. *Bibby*, 32 Beav. 221; *Mason* v. *Broadbent*, 33 Beav. 296; *Edmunds* v. *Waugh*, L. R. 1 Eq. 418; *Gyles* v. *Gyles*, Cas. temp. Napier, 257; *Butler* v. *Carter*, L. R. 5 Eq. 276. A trust created by a testator of his real estate for payment of his debts does not remove from a creditor the consequences arising from his negligence or acquiescence, whether expressed or implied: *Harcourt* v. *White*, 28 Beav. 303, 309.

(*x*) 27 C. D. 676.

In *Webster* v. *Webster* (*y*), the testator died in 1786, but the Will was not proved by the executor till 1802: Nevertheless, on a bill filed by the creditor against the executor in 1803, a plea of the Statute of Limitations was allowed, because the bill alleged that the defendant had possessed himself of the personal estate previously to 1792, and might, therefore, have been sued as an executor *de son tort*.

Claims against the executor or administrator personally.

By sect. 8 (1) of the Trustee Act, 1888 (*z*) "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply":—

Sect. 8 of the Trustee Act, 1888.

(a.) "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him" (*a*).

Trustee to have the benefit of any Statute of Limitations.

(b.) "If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies (*b*), the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(3) "This section . . . shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations."

It appears to be now settled, that if time has once begun to run against a debt in the debtor's lifetime, it does not after-

From when time runs.

(*y*) 10 Ves. 93.

(*z*) 51 & 52 Vict. c. 59.

(*a*) *Ibid.*

(*b*) For instances of this, see *Re Swain*, [1891] 3 Ch. 233; *Re Timmis*, *Nixon* v. *Smith*, [1902] 1 Ch. 176.

wards cease to run during the period which may elapse between his death and the time at which a personal representative is constituted to him: The rule in this respect appears to be the same in equity (*c*) as at law (*d*).

In cases of fraud, or mistake, it has always been held by Courts of Equity that the statute runs from the discovery; because the laches of the plaintiff commences from that date (*e*).

Creditor's claims.

It was held by Sir Anthony Hart, V.-C., in *Sterndale* v. *Hankinson* (*f*), that a bill which had been filed by one creditor on behalf of himself and all other creditors, prevented the Statute of Limitations (21 Jac. I.) from being a bar to the claim of another creditor, who had come in under the decree: And his Honour stated that he entertained no doubt that every creditor had, after the filing of the bill, an inchoate interest in the suit to the extent of its being considered as a demand, and to prevent his debt being shut out because the plaintiff had not obtained a decree within the six years (*g*). But in the case of *Re Greaves* (*h*), Sir George Jessel, M. R., stated that creditors had better not rely upon the above decision in the future, and pointed out that the decision in *Sterndale* v. *Hankinson* depended upon a variety of circumstances, none of which exist at the present time (*i*). And it now appears to be settled that an action for administration brought by one creditor (not on behalf of himself and all other creditors) does not save the claim of another creditor which was barred by the Statute of Limitations before judgment (*k*).

(*c*) *Freake* v. *Cranefeldt*, 3 Mylne & Cr. 499; *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71.

(*d*) *Ante*, p. 1580.

(*e*) *Brooksbank* v. *Smith*, 2 Y. & Coll. Ex. 58; *Ecclesiastical Commissioners* v. *North Eastern Rail. Co.*, 4 C. D. 845, 860. An executor cannot protect himself by the Statute of Limitations from payment of a debt due from himself to his testator by deferring proof of the Will. The probate will be considered to have relation to the testator's death, and the debt will be treated as assets in the executor's hands at that time: *Ingle* v. *Richards*, 28 Beav. 366; *Ante*, p. 214.

(*f*) 1 Sim. 393.

(*g*) As to this inchoate interest in an administration action, see *Tollner* v. *Marriott*, 4 Sim. 19; *Watson* v. *Birch*, 15 Sim. 523; *Franco* v. *Alvares*, 3 Atk. 342. But see *contra*, *Re Hartley*, 34 C. D. 742, where, however, there was no general administration decree.

(*h*) 18 C. D. 551.

(*i*) See also *Berrington* v. *Evans*, 1 Y. & Coll. 434; *Tatham* v. *Williams*, 3 Hare, 347.

(*k*) *Re Greaves*, 18 C. D. 551.

Another creditor will not be permitted in a creditor's action to set up the Statute of Limitations against the party whose claim is the foundation of the judgment (*l*).

Writ of *ne exeat regno.*

There may be some doubt whether the writ of *ne exeat regno* (which is a sort of mesne process until final judgment to apprehend a person and so prevent him from leaving the realm, unless he has given security for the amount of his debt) (*m*) has not in effect been abolished by the Debtors Act, 1869 (*n*), but as the question does not seem to have been finally determined, it is thought better to preserve some account of the writ and its use.

The writ of *ne exeat regno* has been considered in the nature of equitable bail (*o*), and it was understood, that a Court of Equity proceeded in respect to it, by analogy to the proceedings at law in cases of legal bail (*p*). It is only applicable to claims such as before the Judicature Acts could have been brought forward in Chancery (*q*).

Object of writ.

It has been said, that the object of this writ is to obtain security from a person intending to leave the country, when the other party has not a legal remedy, and cannot hold him to bail (*r*). But it was settled, that, though a plaintiff, swearing to the balance of an account, might have bail at law, yet the Court of Chancery holding a concurrent jurisdiction upon the head of account, the plaintiff might also have the writ of *ne exeat regno:* And when a creditor files a bill for an account and administration of the assets, if there is a *clear* affidavit of assets received, the Court of Chancery will grant the writ (*s*).

Writ of *ne exeat regno* against a

In *Moore* v. *Meynell* (*t*), Lord Cowper ordered a writ of *ne exeat regno* to issue against a married woman, the administratrix

(*l*) Dan. Ch. Pr. 7th edit. 832.

(*m*) Seton's Judgments and Orders, 6th edit. 516.

(*n*) 32 & 33 Vict. c. 62; *Drover* v. *Beyer*, 13 C. D. 242; *Hands* v. *Hands*, 43 L. T. 750.

(*o*) *Haffey* v. *Haffey*, 14 Ves. 261. And see *Sobey* v. *Sobey*, L. R. 15 Eq. 200. For forms of order, see Seton, 6th edit. 515—517. For practice, see Dan. Ch. Pr. 7th edit. p. 1396 *et seq.*

(*p*) *Pannell* v. *Taylor*, 1 Turn. & Russ. 103. See *Jenkins* v. *Parkinson*, 2 M. & K. 5. And see now stat. 32 & 33 Vict. c. 62, s. 6, and R. S. C. Ord. LXIX. for the practice under that section.

(*q*) *Drover* v. *Beyer*, 13 C. D. 242.

(*r*) *Swift* v. *Swift*, 1 Ball & B. 227.

(*s*) *Jones* v. *Alephsin*, 16 Ves. 471. But a residuary legatee cannot have a writ of *ne exeat regno* against a debtor of the testator on the ground that he colludes with the executor: *Graves* v. *Griffith*, 1 Jac. & Walk. 646; *Colverson* v. *Bloomfield*, 29 C. D. 341.

(*t*) 1 Dick. 30.

married woman.

of a former husband, who had come to England to get in his property: And Lord Macclesfield afterwards refused to discharge this order (*u*). And upon the authority of this case, Lord Hardwicke, in *Jerningham* v. *Glass* (*x*), where a wife was executrix of a former husband, and her second husband was gone out of the kingdom, granted the writ against her alone. Again, in *Moore* v. *Hudson* (*y*) (July, 1821), Sir John Leach, V.-C., granted writs of *ne exeat regno* against husband and wife, executrix, the plaintiff undertaking not to serve more than one of the writs. But in *Pannell* v. *Taylor* (*z*) (February, 1823), Lord Eldon, after great consideration, decided that a writ of *ne exeat regno* against a *feme covert* executrix or administratrix could not be sustained. A married woman can, however, now be arrested under the provisions of sect. 4, sub-sect. 3, and sect. 6 of the Debtors Act, 1869 (*a*).

Attachment against wife executrix.

In *Bunyan* v. *Mortimer* (*b*), a bill was filed against a husband and wife in respect of a demand against the wife as executrix: The husband, who was a bankrupt, had appeared for himself and his wife, and had gone abroad, and an attachment had issued against him for want of an answer: And it was held by Sir J. Leach, V.-C., that such an attachment could not be granted against the wife, until an order had been obtained that she should answer separately, and that she must have notice of the motion for that order.

(*u*) 3 Atk. 409, 410.

(*x*) 3 Atk. 409; *S. C. nom. Ternegan* v. *Glass*, Ambl. 62; *S. C. nom. Jernegan* v. *Glass*, 1 Dick. 107.

(*y*) Madd. & G. 218.

(*z*) 1 Turn. & Russ. 96.

(*a*) *Re Turnbull*, [1900] 1 Ch. 180. It appears, from the decree in *Moore* v. *Meynell*, that the *feme covert* in that case had large separate property, and had executed bonds, &c. And Lord Eldon observed thereupon that there may be a very great difference between the case of a married woman who has separate property and the case of a married woman who is administratrix, and as administratrix can have no separate property at all: *Pannell* v. *Taylor*, 1 Turn. & Russ. 96, 103. See also *ante*, p. 1569. In *Re Turnbull*, [1900] 1 Ch. 180, Stirling, J., decided that if a married woman administratrix fails to comply with an order to pay into Court a sum of money belonging to the estate of the intestate, and shown by her account of the intestate's personal estate to be in her possession, the Court has jurisdiction to make an order for attachment against her, for the better securing of the fund. *Secus*, however, if the object is to compel her to make good a loss occasioned by her devastavit.

(*b*) Madd. & G. 278.

In general an order of *ne exeat* can only be issued for an equitable debt actually payable. It can, however, apparently also be issued for the balance of an account on which an action may be maintained, and for arrears of alimony decreed (*c*).

Defendant can obtain order of *ne exeat.*

The application is made *ex parte* on affidavit (*d*).

The usual practice is to require the plaintiff to give an undertaking as to damages and to accept short notice of motion (*e*).

Practice on application for a writ of *ne exeat.*

The defendant may at any time after arrest apply to the Court or a Judge to rescind or vary the order or to be discharged from custody, or for such relief as may be just (*f*).

Generally speaking, the affidavit, on which the application for a *ne exeat regno* is grounded, must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail (*g*): but in the case of partners and executors, information and belief is held sufficient (*h*). The affidavit ought to swear, or aver to the best of the knowledge and belief of the deponent, that assets have come to the hands of the executor or administrator (*i*); and it should appear distinctly that he has a present intention to leave the country (*k*).

Affidavit in support of application.

The debt in respect of which a writ of *ne exeat regno* is sought must be actually due and payable and for an ascertained amount (*l*). The evidence of the debt must be positive and clear (*m*), as also the defendant's intention to leave the

Proof required.

(*c*) *Whitehouse* v. *Partridge*, 3 Sw. 365; 19 R. R. 216, 218.

(*d*) R. S. C. Ord. LXIX. r. 1. As to furnishing copies of the affidavit to the defendant, see Ord. LXVI. r. 7 (j).

(*e*) Seton, 6th edit. 517.

(*f*) R. S. C. Ord. LXIX. r. 1. And see, as to discharging the writ, Dan. Ch. Pr. 7th edit. pp. 1403—1405.

(*g*) *Jackson* v. *Petrie*, 10 Ves. 164; *Amsinck* v. *Barklay*, 8 Ves. 597.

(*h*) *Jackson* v. *Petrie*, 10 Ves. 164; *Rico* v. *Gualtier*, 3 Atk. 501. An affidavit founded on information and belief, which, under Ord. XXXVIII. r. 3, is admissible on interlocutory applications, must state the grounds of such belief. See the rule itself, and *Re J. L. Young Manufacturing Co.*, [1900] 2 Ch. 753.

(*i*) *Anon.* 2 Ves. Sen. 489. A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*: *Howkins* v. *Howkins*, 1 Dr. & Sm. 75, 78.

(*k*) *Darley* v. *Nicholson*, 1 Dr. & W. 66; *Perry* v. *Dorset*, 19 W. R. 1048.

(*l*) *Colverson* v. *Bloomfield*, 29 C. D. 341; *Anon.* 5 N. R. 358; *Flack* v. *Holm*, 1 J. & W. 405.

(*m*) *Perry* v. *Dorset*, 19 W. R. 1048.

country (*n*). The plaintiff must also clearly prove that he will be materially prejudiced in the prosecution of his claim by the defendant leaving the kingdom (*o*).

Before time limited for payment.

If the Court be satisfied that the defendant is going abroad to evade payment, it can make an order of *ne exeat*, although an order for payment has been made but the time for payment has not arrived (*p*).

Now limited to cases falling within sect. 6 of the Debtors Act, 1869.

In *Drover* v. *Beyer* (*q*), Jessel, M. R., held that a writ of *ne exeat regno* is only to be issued in those cases which fall within sect. 6 of the Debtors Act, 1869. The case went to the Court of Appeal, and that Court decided the appeal on another point, and do not appear to have expressed any opinion on Sir George Jessel's view of sect. 6. In the later case of *Hands* v. *Hands* (*r*), Jessel, M. R., followed his decision in *Drover* v. *Beyer*.

Sect. 6 of Debtors Act.

Sect. 6 of the Debtors Act, 1869 (*s*), provides as follows:—

"After the commencement of this Act a person shall not be arrested upon mesne process in any action.

"Where the plaintiff in any action in any of her Majesty's Superior Courts of Law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment, by evidence on oath to the satisfaction of a Judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such Judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

(*n*) *Perry* v. *Dorset*, 19 W. R. 1048.

(*o*) *Drover* v. *Beyer*, 13 C. D. 242; *Vanzeller* v. *Vanzeller*, 15 Jur. 115; *Boehm* v. *Wood*, T. & R. 332.

(*p*) *Sobey* v. *Sooby*, L. R. 15 Eq. 200; *Whitehouse* v. *Partridge*, 3 Sw. 365. But see *Colverson* v. *Bloomfield*, 29 C. D. 341, where the order was not served.

(*q*) 13 C. D. 243.

(*r*) 43 L. T. 750.

(*s*) 32 & 33 Vict. c. 62.

"Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

Practice under Debtors Act.

The practice under sect. 6 of the Debtors Act, 1869, is now regulated by Ord. LXIX. of the Rules of the Supreme Court, 1883.

The exercise of the power of arrest under the section is discretionary (*t*). Where the defendant is arrested under it, he can only be kept in prison until final judgment (*u*).

Sect. 4, sub-s. 3, of Debtors Act.

By sect. 4 of the Debtors Act it is provided that:—

"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment . . . .

"(3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." (*x*).

Costs.

General rule.

In an action against an executor or administrator, other than an action for administration of the assets, costs are in the discretion of the Court or Judge (*y*). In such cases the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party: Accordingly, if an executor or administrator is sued in equity by a creditor for a debt of the deceased, and the creditor succeeds in establishing his demand, the Court will direct the payment of the amount due to the creditor, together with his costs, out of the estate (*z*), but unless the estate is insufficient, no order is made with regard to the payment of the costs of the personal representative, it being supposed that he may reimburse himself out of the assets;

(*t*) *Hasluck* v. *Lehman*, 6 Times Rep. 435.

(*u*) *Hume* v. *Druyff*, L. R. 8 Ex. 214.

(*x*) The question of the liability of an executor to attachment under this sub-section will be found discussed, *ante*, p. 1618.

(*y*) R. S. C. Ord. LXV. r. 1.

(*z*) Dan. Ch. Pr. 7th edit. 998; *Lyse* v. *Kingdon*, 1 Coll. 184.

so that if there be no further fund out of which he may reimburse himself, the costs must come out of his own pocket: And even if it should appear, upon taking the accounts, that there is no such fund, still the Court will not give any directions with regard to his costs (*a*).

Question of allowance of costs to executor out of his estate.

The question whether an executor or administrator who sues or defends, and is unsuccessful, is to be repaid his costs out of his estate, is totally distinct from the question whether he is liable to the other party to the action or not, and will be found dealt with later on in this chapter (*b*).

Costs in an administration suit:

of the executor, &c., out of the fund:

But where a suit is instituted, either by creditors or residuary legatees, for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative, and distributed under the direction of the Court, his costs of suit, as between solicitor and client, are, generally speaking, provided for; and even where the assets are insufficient to pay the creditors of the deceased, these costs, and any other costs, charges, and expenses properly incurred by him, continue the first charge on the estate (*c*).

cases in which the executor, &c., has to pay costs personally.

The above is the general rule, but it is governed by the circumstances of each particular case, and in cases marked by fraud, evasion, or neglect of duty, the Court will not merely refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to the breach of duty on his part (*d*); but

(*a*) Dan. Ch. Pr. 7th edit 998; Morgan and Wurtzburg on Costs, 179.

(*b*) See *post*, p. 1670.

(*c*) *Tipping* v. *Power*, 1 Hare, 405, 411; *Gaunt* v. *Taylor*, 2 Hare, 413; *Ante*, pp. 752, 753; *Jackson* v. *Woolley*, 12 Sim. 12; *Ottley* v. *Gilby*, 8 Beav. 602; *Tanner* v. *Dancey*, 9 Beav. 339; *Re Griffith*, [1901] 1 Ch. 807. As to the priority of the executor's costs of an administration action over costs in a probate action, see *Re Mayhew*, 5 C. D. 596. See also *Re Price*, 31 C. D. 485. As to the priority of the executor's costs in a creditor's administration action where there is no personal estate, see *Re Pearce*, 56 L. T. 228; *Hibernian Bank* v. *Lauder*, [1898] 1 I. R. 262. In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate, the personal representatives are entitled, if the assets are deficient, to payment of their costs, charges, and expenses, in priority to the plaintiff's costs of the sale: *Re Spensley's Estate*, L. R. 15 Eq. 16. But see *Pinchard* v. *Fellows*, L. R. 17 Eq. 421.

(*d*) *Heighington* v. *Grant*, 1 Phil. Ch. C. 600; *Hide* v. *Haywood*, 2 Atk. 126; *Hewett* v. *Foster*, 7 Beav. 348. But see as to costs subsequent to decree, *Easton* v. *Landor*, W. N. (1892), 176. In *Re*

mere negligence is not sufficient to deprive an executor or administrator of his costs (*e*).

An executor's or administrator's costs are not discretionary.

Rule 1 of Ord. LXV., which provides that the costs of all proceedings in the Supreme Court are in the discretion of the Judge, excepts from the general rule the case of an executor or administrator "who has not unreasonably instituted or carried on or resisted any proceedings," and provides that he is not to be deprived "of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (*f*).

The effect of the rule may be stated to be that an executor or trustee is entitled to his costs (including costs, charges, and expenses) in any action to administer his estate unless it is established that he is guilty of such misconduct as justifies the Judge in depriving him of them (*g*).

Misconduct.

It is, of course, impossible to define exactly what will amount to such misconduct; where executors first withheld accounts and then rendered incorrect ones they were ordered to pay the costs of the action (*h*), and mere non-feasance has been held to amount to such misconduct as in *Re Weall* (*i*), where executors

Skinner, [1904] 1 Ch. 289, where proceedings for administration were rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, the defaulting trustees were ordered to pay all the costs, including the costs of taking and vouching the accounts. Farwell, J., at p. 293, says: "I think that the view expressed by Lord Langdale in *Hewett* v. *Foster*, as explained by the Court of Appeal in *Easton* v. *Laudor*, was a correct statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as everyone interested in the estate had a right to have the accounts taken in Court, the order for an account in an administration action went as a matter of course, and the costs of taking it came as a general rule out of the estate. But that is no longer the case now. Since October 24th, 1883, there is no longer any such general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate." See also *Fell* v. *Lutwidge*, Barnard, Chanc. 322; *Avery* v. *Osborne*, *ibid.* 352; *Brown* v. *How*, *ibid.* 358; *Vaughan* v. *Thurston*, Colles, 175; *Bennett* v. *Attkins*, 1 Y. & Coll. 247; *Baker* v. *Carter*, *ibid.* 250; *Toner* v. *Thompson*, 7 Sim. 145; *Western* v. *Chapman*, 1 Coll. 181; *Tickner* v. *Smith*, 3 Sm. & G. 42; *Boynton* v. *Richardson*, 31 Beav. 340. See also Dan. Ch. Pr. 7th edit. pp. 991—997.

(*e*) *Travers* v. *Townsend*, 1 Moll. 496. See hereon Morgan and Wurtzburg on Costs, 179.

(*f*) Ord. LXV. r. 1.

(*g*) *Re Love*, 29 C. D. 348. See also *Re Knight's Will*, 26 C. D. 82.

(*h*) *Re Radcliffe*, 50 L. J. Ch. 317.

(*i*) 42 C. D. 674.

allowed their solicitor to retain and pay himself some costs which the Court held to be unnecessary, and other costs which should have been charged against *corpus* but which the executors had improperly charged against income.

Executor bringing a useless action.

In the case of *Re Clabburn* (*k*), Bacon, V.-C., ordered the plaintiff, who was executor and trustee of the Will, to personally pay the costs of an administration action which was held to be unnecessary. The estate in that case was a very small one, and the defendant beneficiaries had offered to concur in a special case to settle any point of doubt or difficulty arising under the Will.

Trustee entitled to solicitor and client costs unless deprived on account of misconduct.

A trustee is, in an administration action, always entitled to his costs as between solicitor and client, unless a case of misconduct is made out against him such as to justify the Judge in depriving him of them (*l*).

Appeal from an order refusing costs.

An order refusing a trustee his costs can always be appealed from (*m*), as he can only be deprived of them on the ground of misconduct, and the question of misconduct or no misconduct is a matter on which an appeal lies (*n*). But if the Judge fairly exercises his discretion as to the costs of an executor, administrator or trustee, no appeal will lie from his decision, by reason of sect. 49 of the Judicature Act, 1873. If, however, the Judge has merely applied some rule which in fact excluded his discretion, an appeal will lie (*o*).

Defaulting trustee:

one of two only defaulting.

It is a clear rule that no costs are given to an executor or trustee who is a debtor to the estate until his debt is paid. If one of two executors is a debtor to the estate, his co-executor is entitled to act by a separate solicitor, and if he does so he will be entitled to his costs (*p*). If two executors employ one solicitor, and one of the two executors is a debtor to the estate,

(*k*) 46 L. T. 848. As to an unnecessary action by a legatee, see *Re Cope*, W. N. (1885), p. 154.

(*l*) *Re Love*, 29 C. D. 348. See also *Re Knight's Will*, 26 C. D. 82. And so an administrator, even though the action has been caused by a claim by him for certain payments disallowed in his accounts provided the claim was made under an honest mistake and was neither fraudulent nor monstrous: *Re Jones*, [1897] 2 Ch. 190.

(*m*) Ann. Pr. 1904, p. 943, where the cases will be found conveniently cited.

(*n*) *Re Love*, *supra*. See also *Re Knight's Will*, *supra*.

(*o*) *The City of Manchester*, 5 P. D. 221; *Bew* v. *Bew*, [1899] 2 Ch. 467, disapproving; *Charles* v. *Jones*, 33 C. D. 80, on this point.

(*p*) Jessel, M. R., in *Smith* v. *Dale*, 18 C. D. at 518.

the taxing-master on taxation finds what is the fair amount of costs to be attributed to the executor who is a debtor to the estate. This amount is deducted from the total costs of the two, and the balance after making such deduction is the amount allowed as costs of the other executor (*q*).

Principle on which the costs of a defaulting trustee are disallowed.

The principle seems to be that the costs due to the executor, who is indebted to the estate, are set off against his debt, and the proper form of order appears to be to order payment of the costs due to him from the estate, and for the order also to provide that such costs are not to be paid until he makes good the moneys due from him to the estate (*r*), and it makes no difference for this purpose whether the debt arises from a default of the executor or trustee, or is simply a debt due from him to the testator's estate.

Costs of a defaulting executor who becomes bankrupt.

If an executor who is indebted to the estate becomes bankrupt, his costs incurred prior to the bankruptcy are set off against the debt (*s*). The costs incurred subsequently to the bankruptcy stand on a different footing, and the question whether such costs will be paid out of the estate seems now to depend mainly on whether the debt due from the executor or trustee is discharged by the bankruptcy or not.

Conflicting decisions.

There are conflicting decisions on the point, one decision of Hall, V.-C. (*t*), and the other of North, J. (*u*).

Both cases arose under the Bankruptcy Act, 1869, in both cases the debt due from the defendant was a debt due in respect of a breach of trust, and by sect. 49 of the Bankruptcy Act, 1869, bankruptcy was not a discharge from a debt incurred by breach of trust. North, J., held that as the debt was not discharged the executor was not entitled to his costs incurred after the bankruptcy unless he paid the debt. Hall, V.-C., followed an earlier case of *Bowyer* v. *Griffin* (*x*), which North, J., declined to follow, and held the trustee entitled to the costs subsequently to the bankruptcy without making good his default, it seeming to him (as his Lordship stated) to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was

(*q*) *Smith* v. *Dale*, 18 C. D. 516. See also *McEwan* v. *Crombie*, 25 C. D. 175. The earlier case of *Watson* v. *Row*, L. R. 18 Eq. 680, seems now to be overruled.

(*r*) *Lewis* v. *Trask*, 21 C. D. 862; *Re Basham*, 23 C. D. 195.

(*s*) *Smith* v. *Dale*, *supra*; *Re Basham*, *supra*; *Re Vowles*, 32 C. D. 243.

(*t*) *Clare* v. *Clare*, 21 C. D. 865.

(*u*) *Lewis* v. *Trask*, 21 C. D. 862.

(*x*) L. R. 9 Eq. 340.

retained as a party to an action, as executor or trustee, should be paid his costs (*y*).

In the case of *Re Basham* (*z*), Chitty, J., after a very full consideration of the authorities, followed the decision of North, J., and both the last-named Judge and Pearson, J., acted on the same rule in later cases (*a*).

Sect. 30 of the Bankruptcy Act, 1883.

It will be remembered that sect. 30 of the Bankruptcy Act of 1883 is more favourable to the bankrupt than sect. 49 of the Bankruptcy Act, 1869, and under sect. 30 of the Bankruptcy Act, 1883, a bankrupt executor, administrator, or trustee, only remains liable to the estate for debts incurred by fraudulent breach of trust. The consequence is, that where his debt is for a fraudulent breach of trust he will get no costs at all; if the debt arise on any other ground, he will get his costs subsequently to the bankruptcy.

Costs due to a trustee who has become bankrupt, whether incurred before or after bankruptcy, are payable to the trustee in bankruptcy; unless the solicitor of the trustee obtains a charging order in his favour (*b*).

Costs sometimes given to a defaulting trustee on account of assistance rendered.

In meritorious cases, where the Court has derived assistance in taking the accounts from having the executor represented by solicitors and counsel in the action, it will sometimes order him to have costs out of the estate notwithstanding he remains a debtor to the estate (*c*), but the solicitor for the defaulting executor should, before incurring costs, point out to the beneficiaries that the executor can only attend and assist in the proceedings if his costs are paid out of the estate, and obtain their sanction to his attending on those terms before the costs are incurred.

Trustee making good his default: right to costs.

A trustee who has not been guilty of dishonesty, and who has made good to the estate the deficiency arising from an improper investment made by him, will not be ordered to pay costs (*d*).

Executors' and trustees' priority as to costs.

Where the estate is insufficient for payment of costs executors and trustees are entitled to payment of their costs, charges, and

(*y*) 21 C. D. 867.
(*z*) 23 C. D. 195.
(*a*) *McEwan* v. *Crombie*, 25 C. D. 175; *Re Vowles*, 32 C. D. 243.
(*b*) *Baker* v. *Abbott*, W. N. (1897), 38.
(*c*) See remarks of Chitty, J., in *Re Basham, supra.*
(*d*) *Peacock* v. *Colling*, 54 L. J. Ch. 743.

expenses, in priority to all other parties to an administration action (*e*).

Executor of a defaulting trustee.

The executor or administrator of a defaulting trustee, who accounts fairly for the assets come to his hands, is entitled to deduct his costs of the action out of the assets of his testator or intestate, even although they may be insufficient to repair the breach of trust (*f*).

In the case of *Re Griffiths* (*g*), an action was brought against the executor of a deceased executor for the administration of the estate of the original testator. The defendant properly accounted for all assets which had come to his hands. A balance was found due from the estate of the original executor to the estate of the original testator, which balance the estate of the original executor was insufficient to pay. Cotton, L. J., said that the strict order would be to allow the defendant out of the estate of the original testator all the costs incurred solely with reference to the original testator's estate, but as to the costs incurred by the defendant solely as representative of his own testator, the defaulting executor, he ought to be allowed them solely out of the estate of the defaulting executor. Fry, L. J., in the same case, pointed out that there was a third class of costs, coming under neither of the above heads, and they ought to be divided between the two funds (*h*).

Payments allowed as costs, charges, and expenses.

The following payments have been held to be included in costs, charges, and expenses: costs of proceedings by an administrator against a defaulting solicitor, taken *bonâ fide* for the benefit of the estate (*i*), the costs of an action properly defended by a trustee (*k*), costs of a sale rightly made by trustees under a power (*l*), costs of former trustees paid to the executor of the survivor in consideration of his transferring the trust property (*m*).

Order giving "costs,

It was held by Jessel, M. R., in *Re Chennell* (*n*), that an

(*e*) *Dodds* v. *Tuke*, 25 C. D. 617; *Wetenhall* v. *Dennis*, 33 Beav. 285; *Henderson* v. *Dodds*, L. R. 2 Eq. 532.

(*f*) *Haldenby* v. *Spofforth*, 9 Beav. 195; *Horne* v. *Shepherd*, 3 Jur. N. S. 806.

(*g*) 26 C. D. 465.

(*h*) See also *Lyse* v. *Kingdon*, 1 Coll. 184, 189; *Palmer* v. *Jones*. 43 L. J. Ch. 249; *Re Kitto*, 28 W. R. 411.

(*i*) *Re Davis*, 57 L. T. 755.

(*k*) *Walters* v. *Woodbridge*, 7 C. D. 504; *Re Llewellin*, 37 C. D. 317, 327.

(*l*) *Re Mansel*, 54 L. J. Ch. 883.

(*m*) *Harvey* v. *Olliver*, 57 L. T. 239.

(*n*) 8 C. D. 492.

charges, and expenses."

order giving trustees their costs, charges, and expenses, gives them something more than their costs of the action, and therefore entitles them to appeal as to costs only. In *Charles* v. *Jones* (*o*), however, a different view was taken by Cotton, L. J., and it was held by the Court of Appeal in *Bew* v. *Bew* (*p*), that the view of Cotton, L. J., was the right one.

"Moderation" of bill of costs.

A trustee in passing his accounts is not allowed without question sums paid by him to his solicitor for costs; and the bill, although not submitted to a regular taxation, can be submitted to the taxing-master to be "moderated," *i.e.*, for the taxing-master to disallow such items as are irregular and excessive (*q*).

Costs of a solicitor-trustee.

A solicitor-trustee is only entitled to charge his costs and expenses out of pocket found by the taxing-master to have been properly incurred (*r*), unless he is specially authorized by the instrument creating the trust to make further charges (*s*), and although he be empowered to charge professional charges he is not entitled to charge for services which are not strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attendances at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors (*t*); but where an executor was authorized to make the usual professional or other proper and reasonable charges he was held entitled to charge for business not strictly of a professional nature transacted by him in relation to the trust estate (*u*). A solicitor should not in a Will appointing him executor or trustee insert any authority to himself to charge for business not strictly professional, unless the testator has expressly instructed him to insert such a power (*x*).

Duty of a solicitor inserting a power in a Will authorizing him to charge.

Effect of the solicitor

A power authorizing a solicitor-trustee to charge for pro-

(*o*) 33 C. D. 80, 81—82.

(*p*) [1899] 2 Ch. 467, 472.

(*q*) *Johnson* v. *Telford*, 3 Russ. 477; *Allen* v. *Jarvis*, L. R. 4 Ch. 616; *Aylesford* v. *Poulett*, 63 L. T. 519; *Re Park*, 41 C. D. 326; *ante*, p. 1508.

(*r*) *Robinson* v. *Pett*, 2 Lead. Cas. Eq. 214, 6th edit.

(*s*) *Re Shearwood*, 2 Beav. 338; *Moore* v. *Frowd*, 3 M. & Cr. 45; *Re Wyche*, 11 Beav. 209.

(*t*) *Harbin* v. *Darby*, 28 Beav. 325.

(*u*) *Re Ames*, 25 C. D. 72. But see *Re Chapple*, 27 C. D. 584. And cf. *Re Fish*, [1893] 2 Ch. 413; *Clarkson* v. *Robinson*, [1900] 2 Ch. 722.

(*x*) Kay, J., in *Re Chapple*, 27 C. D. 587.

fessional services is inoperative if the solicitor himself attests the Will (*y*).

attesting the Will.

A solicitor who is the sole executor and trustee of a Will is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the Will contains a clause authorizing him to charge for work done as such solicitor (*z*).

A solicitor-trustee who acts as solicitor for other parties in an action will be allowed his costs, and this none the less that he acts for himself as well, unless and except so far as the costs are increased by acting for himself as well as the others (*a*); but this does not apply to his costs in the administration of the trusts outside a suit, the general principle that a trustee is not permitted to profit by his trust, or to place himself in a situation in which he may be tempted to deal with his trust with a view to his own profit, being held to apply to the latter case and not to the former (*b*). It is difficult to see the distinction between the two cases, and Chitty, J., and the Court of Appeal, in following (*c*) *Cradock* v. *Piper* (*d*), seem to have considered that the exception to the general rule made by *Cradock* v. *Piper* had been too long established to be disturbed (*e*).

A solicitor-trustee acting for other parties to the action.

After the costs of the executor or administrator are satisfied, the next claim on the fund arising from the personal estate is that of the plaintiff in the suit for his costs incurred in it (*f*).

Of the plaintiff in the action out of the fund.

One consequence of this right of the plaintiff to his costs of the suit appears to be, that if the executor or administrator, after the decree, makes payment of a debt with a view to be reimbursed out of the fund in Court, his right to be so reimbursed must be postponed to the payment of the plaintiff's costs: that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him (*g*). Again, if the suit has been properly instituted and there are either assets in Court or outstanding assets to be administered, it seems to

(*y*) *Re Barber*, 31 C. D. 665; 34 C. D. 77; *Re Pooley*, 40 C. D. 1.

(*z*) *Re White*, [1898] 2 Ch. 217.

(*a*) *Cradock* v. *Piper*, 1 M. & G. 664; *Re Barber*, 34 C. D. 77. But see *Re Corsellis*, 34 C. D. 675; cf. *Vipont* v. *Butler*, W. N. (1893), 64.

(*b*) *Lincoln* v. *Windsor*, 9 Hare, 158; *Re Barber*, *supra*.

(*c*) In *Re Barber*, *supra*, and *Re Corsellis*, *supra*.

(*d*) 1 M. & G. 664.

(*e*) As to a solicitor-trustee employing his partner, see *Clack* v. *Carlon*, 30 L. J. Ch. 639.

(*f*) *Hearn* v. *Wells*, 1 Coll. 323.

(*g*) *Jackson* v. *Woolley*, 12 Sim. 16, 17.

have been held that the plaintiff's costs of suit must be paid out of those assets, whatever may be the hardship on the executor or administrator as to his demand on them in respect of having, before suit, paid other creditors of the estate with his own money (*h*).

But the personal representative's right of retainer for his own debt will prevail, as there has already been occasion to show (*i*), against the plaintiff's right to his costs.

Costs of persons taking proceedings against an executor or administrator discretionary.

The costs of a person (beneficiary or creditor) bringing proceedings against an executor or administrator are now always in the discretion of the Court (*k*), and an order refusing a beneficiary or creditor plaintiff his costs in an administration action, or making him pay costs, is an order within the discretion of the Judge, under Ord. LXV. r. 1, and cannot be appealed from (*l*).

No appeal from an order refusing a legatee costs.

Legatee plaintiff not entitled as of right to costs.

Prior to the Rules of 1883, the rule was that a residuary legatee filing a bill for administration had a right to have his costs out of the estate, unless that right was displaced by some special ground for depriving him of them (*m*).

Old rule did not apply to hostile actions.

Hostile actions against executors or trustees, for instance, an action seeking to charge them with costs on the ground of misconduct (*n*), did not come under the old rule.

Costs of beneficiary who has mortgaged his legacy.

Where a beneficiary has mortgaged his legacy or share one set of costs only is allowed to him and his incumbrancer attending the proceedings, that set of costs is payable to the incumbrancer so far as may be necessary to satisfy the incumbrancer's costs of action, and after such payment the balance of costs is payable to the plaintiff (*o*).

Creditor's right to solicitor and client costs.

A creditor bringing an administration action is entitled to solicitor and client costs if the estate proves insufficient for payment of the debts (*p*), at any rate where he sues on behalf of himself and the other creditors of the deceased (*q*), the reason given being that it would be unreasonable that the general

(*h*) *Hearn* v. *Wells*, 1 Coll. 323, 332, 333.

(*i*) *Ante*, p. 785 *et seq.*

(*k*) See R. S. C. 1883, Ord. LXV. r. 1.

(*l*) *Re McClellan*, 29 C. D. 495.

(*m*) *Farrow* v. *Austin*, 18 C. D. 58.

(*n*) *Williams* v. *Jones*, 34 C. D. 120.

(*o*) For form of order, see order in *Thomson* v. *Wingrove*, Seton, vol. ii. p. 1497, 6th edit. See also *Re Goss*, W. N. (1884), p. 192.

(*p*) *Thomas* v. *Jones*, 1 Dr. & Sm. 134.

(*q*) As to this, see *ante*, p. 1641.

body of creditors should take advantage of the exertions of the particular creditor through whose instrumentality the fund has been recovered without paying him all his costs (*r*); and this rule applies equally to a creditor who obtains conduct of an action originally commenced by a legatee or next of kin (*s*).

Legatee plaintiff

A plaintiff in a legatee's administration action is entitled to costs as between solicitor and client only where the estate is sufficient to pay debts but insufficient to pay legacies in full (*t*); and it makes no difference that there has been a contest between the plaintiff and another legatee as to the proper mode of dividing the fund (*u*).

The principle that a creditor plaintiff against an insolvent estate is entitled to his costs as between solicitor and client was extended by Kay, J. (*x*), to the case of a separate creditor suing on behalf of himself and all the other creditors of the testator, the testator being one of a firm of traders. The testator's private estate was solvent, and the separate creditors were paid in full, but the estate of the firm was insolvent.

In the case of *Re Watson* (*y*), a residuary legatee who brought an action to establish his identity was allowed costs out of the estate.

Of creditors coming in under the decree:

It was an established rule that creditors were not to be allowed any of the costs which they were put to, either in the first instance, or in any stage of the proof of their claims before the Master under the decree (*z*). But now by Ord. LV. r. 58, of the Rules of the Supreme Court, 1883, it is provided, that "a creditor who has come in and established his debt in the Judges' Chambers under any judgment or order shall be entitled to the costs of so establishing his debt, and the sum to

(*r*) Jessel, M. R., in *Re Richardson*, 14 C. D. 611, 612. See also the reason given by Kindersley, V.-C., in *Thomas* v. *Jones*, *supra*.

(*s*) *Re Richardson*, *supra*.

(*t*) *Re Hervey*, 26 C. D. 179.

(*u*) *Re Wilkins*, 27 C. D. 703. See also *Henderson* v. *Dodds*, L. R. 2 Eq. 532, where the action was to administer the realty, there being no personalty.

(*x*) *Re McRea*, 32 C. D. 613.

(*y*) 53 L. J. Ch. 305.

(*z*) Nor was a creditor entitled to costs whose debts had been disallowed by the Master, and allowed by the Court on petition: *Watkins* v. *Maule*, Jacob, 105. But if his proof was beneficial to the estate, as where he saved by it the expense of a suit, and there were extraordinary costs, the Court would give them on petition: *Harvey* v. *Harvey*, 6 Madd. 91.

be allowed for such costs shall be fixed by the Judge, unless he shall think fit to direct the taxation thereof: and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established" (*a*). Where the creditor fails to establish his debt, he may be ordered to pay the costs of the inquiry consequent upon his claim, though he is not a party to the action (*b*).

The question out of what particular fund costs are to be paid scarcely comes within the scope of this Work, but it will perhaps be well to refer to the general principles governing the subject.

Whether the costs are to be paid out of the particular fund or out of the general estate.

Where next of kin, or other persons claiming as a class under the Will, succeed in establishing their title, their costs, as above defined, incurred in so doing, are paid out of the general estate before any apportionment of it takes place (*c*). So where a legacy is claimed, in an administration suit, by two legatees adversely to each other, the costs must be borne by the testator's estate (inasmuch as the question arises on his Will) and not by the legacy (*d*). But where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares: and the infants filed a bill for an account against the executors and the other residuary legatees, who, being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct; it was held, that the costs of the suit were payable out of the plaintiff's share alone (*e*). The rule has been laid down to be, that if the executors, admitting a legacy to be payable, sever it from the estate, and a dispute arises between the persons or some of the persons to whom the legacy belongs, and the Court has to

A legacy severed from the rest of the estate.

(*a*) Usually a sum is named for costs of proof at the time the debt is allowed: Ann. Pr. 1904, p. 800. The costs to be allowed to a creditor for proving his debt when it amounts to 20*l.* or upwards are in general 2*l.* 2*s.*, and where below that amount, a smaller fee according to circumstances; Seton, 6th edit. 1435. The plaintiff's costs are costs in the action: Dan. Ch. Pr. 7th edit. p. 842.

(*b*) *Hatch* v. *Searles*, 2 Sm. & G. 147; *Yeomans* v. *Haynes*, 24 Beav. 127. It appears that a special summons must be taken out to obtain payment: Dan. Ch. Pr. 7th edit. 843; and Dan. Ch. Forms, No. 1186.

(*c*) *Shuttleworth* v. *Howarth*, 1 Cr. & Ph. 228.

(*d*) *Wilson* v. *Squire*, 13 Sim. 212. See also *Jolliffe* v. *East*, 3 Bro. C.C. 25; *Ripley* v. *Moysey*, 1 Keen, 578. *Eyre* v. *Marsden*, 4 M. & Cr. 231.

(*e*) *Mackenzie* v. *Taylor*, 7 Beav. 467; *Thompson* v. *Clive*, 11 Beav. 475; cf. *Hilliard* v. *Fulford*, 4 C. D. 389.

decide to whom it belongs, there the particular fund bears the costs; *secus*, if the dispute arises between the persons claiming the legacy and the residuary legatee whether it is payable (*f*). Where there are no other assets, the costs must be paid out of the specific legacies *pari passu* (*g*). It is now settled that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate (*h*). Nor has this rule been altered or affected by the Land Transfer Act, 1897 (*i*). It would seem that where real estates are sold under a decree in an administration suit, the costs incurred by such sale will be payable out of the estates sold (*j*). If the costs of an administration suit are increased by its being also a suit for the execution of the trusts of a settlement, the Court has held that the additional costs must be borne by the settlement fund (*k*).

Administration of real estate.

The costs of a suit for the administration of a testator's estate are payable out of the residue generally and not primarily out of a lapsed share, as there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and costs of the administration of the estate of the testator (*l*). And real estate which has descended to the testator's heir-at-law, not because it was not originally disposed of by the Will, but by reason of a subsequent forfeiture by the devisee under

(*f*) *Att.-Gen.* v. *Lawes*, 8 Hare, 43, by Wigram, V.-C. See also Morgan & Wurtzburg on Costs, 169, 170. But a payment into Court under the Trustee Relief Act (10 & 11 Vict. c. 96) by executors of a sum to answer a legacy to a class, to avoid the trouble of inquiries, was held not to throw the costs on the legacy itself: *Re Gibbons' Will*, 36 C. D. 486; and cf. *Re Birkett*, 9 C. D. 576. Now, by Ord. LXV. r. 14B (R. S. C. Nov. 1893), the costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the Judge shall otherwise direct.

(*g*) *Bristow* v. *Bristow*, 5 Beav. 289; *Cookson* v. *Bingham*, 17 Beav. 262.

(*h*) *Re Middleton*, 19 C. D. 552; *Patching* v. *Barnett*, 51 L. J. Ch. 74; *Re Roper*, 45 C. D. 126; *Re Copland*, W. N. (1895), 137.

(*i*) *Re Jones*, [1902] 1 Ch. 92, *per* Buckley, J. See *ante*, p. 1345.

(*j*) *Barnwell* v. *Iremonger*, 1 Dr. & Sm. 242, 255.

(*k*) *Irby* v. *Irby*, 24 Beav. 525; *Skirrow* v. *Skirrow*, 17 W. R. 759.

(*l*) *Trethewy* v. *Helyar*, 4 C. D. 53, Jessel, M. R., dissenting from a dictum of Malins, V.-C., in *Gowan* v. *Broughton*, L. R. 19 Eq. 77. See also *Fenton* v. *Wills*, 7 C. D. 33; *Blann* v. *Bell*, *ibid.* 382; *Re Jones*, *Jones* v. *Caless*, 10 C. D. 40.

the provisions of the Will, is not liable to pay the costs of an action to administer the estate in priority to specifically devised and bequeathed freehold and leasehold estates (*m*).

In what cases the plaintiff shall pay the executor costs

It remains to consider in what cases the executor or administrator is entitled to receive his costs from the plaintiff. If a creditor plaintiff brings or continues an action after he has been correctly informed that there are no assets applicable to the payment of his debt, he will be ordered to pay the costs, wholly or from the time he receives the information (*n*). In *Robinson* v. *Elliott* (*o*), a creditor filed a bill against an executrix, and she stated, by her answer, that there were no assets for the payment of his debt; he, however, persisted in the suit; and the result of the account in the Master's office was, that there were no assets unadministered, though the executrix was charged with more than she had admitted: And it was held, that the bill should be dismissed without costs as against the executrix. In another case (*p*), on further directions, the case appeared to be, that application had been made to an executor for an account, but that he gave no account: The bill was then filed; and by his answer, the defendant stated the accounts; but the plaintiff took a decree for an account: It turned out, on the Master's report, that the account given by the answer was correct: and the question then was, as to costs: The Vice-Chancellor gave the plaintiff the costs of the suit up to the decree; and the defendant the costs of the subsequent proceedings.

Useless proceedings by a legatee.

Where the proceedings brought by a legatee are unnecessary or improper, he will not be allowed his costs out of the estate, as, for instance, where the plaintiff, a residuary legatee, suing by his next friend, sought to charge the defendant with costs on the ground of misconduct and failed in making out the misconduct (*q*); and the legatee will be ordered to pay the costs of such improper proceedings, as, for instance, the costs of taking unnecessary accounts (*r*), or an abortive attempt to remove a

(*m*) *Hurst* v. *Hurst*, 28 C. D. 159, distinguishing and doubting *Scott* v. *Cumberland*, L. R. 18 Eq. 578; and see *ante*, p. 1345.

(*n*) *Bluett* v. *Jessop*, Jacob, 240; *King* v. *Bryant*, 4 Beav. 460, 462; *Fuller* v. *Green*, 24 Beav. 217.

(*o*) 1 Russ. Ch. C. 599. See Dan. Ch. Pr. 7th edit. 999.

(*p*) *Anon.*, 4 Madd. 373.

(*q*) *Williams* v. *Jones*, 34 C. D. 120.

(*r*) *Croggan* v. *Allen*, 22 C. D. 101; *Re Blake*, 29 C. D. 913.

trustee (*s*); and the Court will not permit the costs occasioned by improper litigation or by negligent conduct of administration proceedings to be paid out of the estate (*t*).

In the case of *Ackers* v. *Ackers* (*u*), North, J., ordered a useless administration action to be stayed, and the plaintiff to pay the costs of the action; the defendant being at liberty to take out of the estate any costs in default.

(*s*) *Fane* v. *Fane*, 13 C. D. 228.

(*t*) *Brown* v. *Burdett*, 40 C. D. 244.

(*u*) W. N. (1884), p. 82. See also *Re Ormston*, 58 L. T. 74; affirmed on appeal, 59 L. T. 594.

CHAPTER THE THIRD.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN THE PROBATE DIVISION OF THE HIGH COURT OF JUSTICE.

AN executor, upon taking probate, as well as an administrator on taking out letters of administration, makes oath that he will (amongst other things) render a true and just account of the estate and effects of the deceased whenever required by law so to do (*a*). An administrator under the Court of Probate Act, 1857 (*b*), must also give a bond conditioned (*inter alia*) to make a "just and true account" of his administration whenever required by law so to do (*c*).

An executor or administrator may be compelled to exhibit an inventory, and render an account of his administration of the personal estate of his testator or intestate in the Probate Division at the instance of a legatee or next of kin, or of a creditor (*d*); but neither an executor nor administrator can be cited by the Probate Division *ex officio* to account (*e*).

The subject of the making of an inventory by an executor or administrator, together with the various questions relating thereto, *e.g.*, the form and contents of the inventory (*f*), the

(*a*) For forms of executors' and administrators' oaths, see Tristram and Coote's Probate Practice, 13th edit. pp. 783, 792 *et seq.*

(*b*) Sect. 81; *ante*, p. 421.

(*c*) For form of administration bond, see Tristram and Coote's Probate Practice, 13th edit. p. 766.

(*d*) This jurisdiction was preserved to the Court of Probate by sect. 23 of the Court of Probate Act, 1857. See *ante*, p. 210.

(*e*) In the case of *Bouverie* v. *Maxwell*, L. R. 1 P. & D. 272, it was decided that the Court of Probate had no jurisdiction to compel administrators who had taken out administration in an Ecclesiastical Court to file inventories and accounts in the Registry of the Court, as such inventories and accounts were by virtue of the 87th section of the Probate Act returnable only into the Court of Chancery. See *ante*, p. 424.

(*f*) *Ante*, p. 747.

cases in which, and the persons from whom, the Court will compel the exhibiting of an inventory (*g*), and the effect of lapse of time in exhibiting the inventory (*h*) has been discussed in an earlier part of this Treatise.

The order of the Court requiring the executor or administrator to bring in an inventory and account is obtained according to the present practice by summons (*i*).

Whether the Probate Division can entertain objections made by a legatee or creditor against the inventory exhibited by the accountant, is a question on which the decisions of the Court of Queen's Bench and the practice of the Prerogative Court of Canterbury were at variance: The principal authorities on the point have been collected in an earlier part of this Treatise (*k*). In practice an inventory is invariably dispensed with, by order of the Judge or of a registrar given under r. 76 of the Rules in the Court of Probate, 1862, and a declaration of the estate of the deceased filed instead (*l*).

The executor or administrator shall be allowed, in the Probate Division, all his reasonable expenses, as well in law-suits as for other honest purposes: and this reasonableness of expenses is to be such, that he may receive thereby neither profit nor loss (*m*). And therefore he shall be allowed his expenses in secular Courts over and above such costs as were allowed there (*n*). It would seem that the decisions which have been elsewhere pointed out (*o*), respecting the accounts and allowances of executors or administrators in equity, would be regarded as authorities in those matters in the Probate Division also.

After the investigation of the account, if the Court finds it true and perfect, it shall pronounce for its validity; and in case all parties interested have been cited, such sentence shall be final, and the executor or administrator shall be subject to no further suit (*p*).

Suit for a legacy.

With respect to legatees and next of kin, they might formerly proceed against the executor or administrator in the

(*g*) *Ante*, p. 746.

(*h*) *Ante*, p. 745.

(*i*) See Tristram and Coote's Probate Practice, 13th edit. pp. 239, 342.

(*k*) *Ante*, p. 748.

(*l*) Tristram and Coote's Probate Practice, 13th edit. 138. For forms of declaration and inventory, see *ibid.* 779, 780.

(*m*) 4 Burn, E. L. 9th edit. 608.

(*n*) *Ibid.*

(*o*) *Ante*, p. 1497 *et seq.*

(*p*) 4 Burn, E. L. 9th edit. 609.

Ecclesiastical Court to recover their legacies, or distributive shares under the statute (*q*).

Indeed, in respect of legacies, the cognizance of them in former times belonged exclusively to the Ecclesiastical jurisdiction; the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (*r*).

20 & 21 Vict. c. 77, s. 23: no suits for legacies to be entertained by the Court of Probate.

But it is provided by the Court of Probate Act (20 & 21 Vict. c. 77, s. 23), that the Court of Probate, to which the jurisdiction of the Ecclesiastical Courts has been transferred, shall entertain no suit for legacies (*s*).

Suits by next of kin for a distribution.

According to the Statute of Distributions, the Ecclesiastical Court had authority to enforce the distribution of an intestate's effects: And as the Act of Parliament contains no negative words, equity had, in this matter also, a concurrent jurisdiction with the Ordinary (*t*).

20 & 21 Vict. c. 77, s. 23: no suits for distribution of residues to be entertained by the Court of Probate.

But it is provided by the Court of Probate Act (20 & 21 Vict. c. 77, s. 23), that the Court of Probate, to which the jurisdiction of the Ecclesiastical Court was transferred, shall entertain no suits for the distribution of residue (*u*).

Now by the Judicature Acts, the jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court of Justice (*x*).

Proctor's fees.

The Ecclesiastical Court could not entertain a suit for proctor's fees; since they are a temporal duty, for which an action may be maintained in the Temporal Courts (*y*).

Injunctions: Receivers.

The Probate Division, in common with the other Divisions of the High Court of Justice, has power to grant injunctions and to appoint receivers by virtue of sect. 25 (sub-sect. 8) of the Judicature Act, 1873, by which it is provided that "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made: and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just: and if an injunction is asked either before or

(*q*) *Glen* v. *Webster*, 2 Cas. temp. Lee, 31.

(*r*) *Decks* v. *Strutt*, 5 T. R. 692.

(*s*) See *ante*, p. 210.

(*t*) *Matthews* v. *Newby*, 1 Vern. 133; Fonbl. Treat. Eq. B. 4, Pt. 2, Ch. 3, s. 2, note (*d*).

(*u*) See *ante*, p. 210.

(*x*) See *ante*, p. 211.

(*y*) *Pollard* v. *Gerard*, 1 Lord Raym. 703; *Johnson* v. *Oxenden*, 4 Mod. 255; Toller, 496.

at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim or title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title: and whether the estates claimed by both or by either of the parties are legal or equitable."

If there is a *lis pendens* in the Probate Division the proper course is to apply to that Court; but if there is no *lis pendens* in the Probate Division that Court has no jurisdiction to appoint a receiver and the application must be made to the Chancery Division, if the assets are in danger, pending probate or grant of letters of administration; but the proper person entitled to the grant should be before the Court on the application (*yy*).

Injunction by executor against a co-executor before probate.

In a case where an executor had before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Court gave leave to the co-executor to issue a writ against him, claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (*z*).

The entry of caveat followed by warning and appearance does not constitute a *lis pendens* enabling the Probate Division to appoint a receiver and administrator *pendente lite*. A writ of summons must be issued to constitute a *lis pendens* (*a*).

(*yy*) *Re Henderson*, 2 Times Rep. 322; *Salter* v. *Salter*, [1896] P. 291.

(*z*) *In the goods of Moore*, 13 P. D. 36. The Court in this case followed the case of *Re Parker*, 54 L. J. Ch. 694, in which it was decided that by sect. 25, sub-sect. 8, of the Judicature Act, 1873, any Judge of the High Court is enabled to appoint a receiver of a deceased's estate (before grant of probate or administration) notwithstanding the absence of *lis pendens* in the Court of Probate; but that applications for any such order being on the way to probate proceedings are properly made in the Probate Division, and if made elsewhere will not be encouraged. It does not decide that where there is no writ issued in an action a receiver will be appointed: *per* Lindley, L. J., *Salter* v. *Salter*, [1896] P. 291, 293. See also *ante*, p. 1614.

(*a*) *Salter* v. *Salter*, [1896] P. 291. Cf. *Moran* v. *Place*, *ibid.* 214; and see *ante*, p. 1614, n. (*o*).

CHAPTER THE FOURTH.

OF EQUITABLE REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN THE COUNTY COURT.

Jurisdiction of the County Court in equity.

By stat. 51 & 52 Vict. c. 43, s. 67, it is enacted that the County Courts shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned; (that is to say,)

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds.
2. For the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds.
5. Under the Trustees Relief Acts (*a*) or under the Trustee Acts (*b*), or under any of such Acts, in which the trust

(*a*) The whole of the Trustees Relief Acts, 1847 and 1849 (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74), and also sect. 30 of the 22 & 23 Vict. c. 35, which enabled trustees and others to apply to the Court for assistance on any question relating to the management of the trust property, were repealed by the Trustee Act, 1893, and no similar provision was substituted in place of the last-mentioned section. See *ante*, p. 1557.

(*b*) Practically the whole of these Acts (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 65) were repealed by the Trustee Act, 1893, which does not in terms confer any jurisdiction on the County Courts. It is conceived, however, that, in so far as these Acts and the Trustees Relief Acts are substantially re-enacted by the last-mentioned Act, the County Courts still have jurisdiction up to 500*l.* in cases coming within the re-enacted provisions. See *ante*, p. 1557.

estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds.

The section, having enumerated other actions and matters, proceeds:

"In all such actions or matters the Judge shall, in addition to the powers and authorities possessed by him, have all the powers and authorities, for the purposes of this Act, of a Judge of the Chancery Division of the High Court; and the treasurer, registrar, and high bailiff respectively shall in all such actions or matters discharge any duties which an officer of the said division can discharge, either under the order of a Judge of the said division, or under the practice thereof, and all officers of the Courts shall, in discharging such duties, conform to any rules or orders made in that behalf under this Act."

Where amount of subject-matter of suit exceeds the limit of the jurisdiction of County Court, suit may be remitted to the Chancery Division, &c.

By sect. 68, "If during the progress of any action or matter under the last preceding section it shall be made to appear to the Judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the Judge to direct the action or matter to be transferred to the Chancery Division of the High Court; and the whole of the procedure in the said action or matter when so transferred shall be regulated by the Rules of the Supreme Court: Provided always, that it shall be lawful for any party to apply to a Judge of the said division at Chambers for an order authorizing and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which equitable jurisdiction is given by the said section; and the Judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order."

Transfer to County Courts of equitable actions or matters.

By sect. 69, "Where any action or matter is pending in the Chancery Division of the High Court which might have been commenced in a Court under this Act, it shall be lawful for any of the parties thereto to apply at Chambers to the Judge of the said division to whom the said action or matter is attached to have the same transferred to the Court or one of the Courts in which the same might have been commenced, and such Judge shall have power upon such application, or without such appli-

cation, if he shall think fit, to make an order for such transfer, and thereupon such action or matter shall be carried on in the Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal as they would have had if the action or matter had been commenced in such Court."

Trustees may pay trust moneys or transfer stock and securities into County Court.

By sect. 70, "Any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise, upon trusts within the meaning of the Trustees Relief Acts, where the same do not exceed in amount or value the sum of five hundred pounds, upon the filing by such trustees or other persons, or the major part of them, with the registrar of the Court within the district of which such persons or any of them shall reside, of an affidavit shortly describing according to the best of their knowledge, the instrument creating the trust, may, in the case of money, be paid into a post office savings bank established in the town in which the Court is held, in the name of the registrar of such Court, in trust to attend the orders of the Court, and upon such persons filing with the registrar the receipt or other document given to them by the officer of the said bank, the registrar shall record the same, and give to them an acknowledgment in such form as may be prescribed, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and, in the case of stocks or securities, may be transferred or deposited into or in the names of the treasurer and registrars of such Court, in trust to attend the orders of the Court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited: and for the above purposes all the powers and authorities of the High Court shall be possessed and exercised by the Courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order."

Where action may be commenced.

By sect. 74, "Except where by this Act it is otherwise provided, every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the Judge or registrar, in the Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before

the time of commencement, or, with the like leave, in the Court in the district of which the cause of action or claim wholly or in part arose."

By sect. 75, "The provisions of the next preceding section shall not apply to any of the following proceedings; but

In what Courts proceedings in equity shall be taken.

"(2) Proceedings under the Trustee Acts, 1850 and 1852 (*c*), shall be taken in the Court within the district of which the persons making the application, or any of them, reside or resides:

"(3) Proceedings for the administration of the assets of a deceased person shall be taken in the Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode:

"Provided that if during the progress of any such proceedings it shall be made to appear to the Court that the same could be more conveniently heard in some other Court, it shall be competent for the Court to transfer the same to such other Court, and thereupon the proceeding shall be taken in such other Court."

In action for administration plaintiff may ask that only a certain question may be decided.

By County Court Rules, 1903, Ord. VI. r. 5 (formerly r. 6), "Where any person entitled to bring or maintain an action for the administration of the estate of any deceased person or the execution of any trust desires to submit for the determination of the Court any of the following questions or matters:

"(a) Any question affecting the rights or interests of any person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*:

"(b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others:

"(c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts:

"(d) The payment into Court of any money in the hands of the executors or administrators or trustees:

"(e) Directing the executors or administrators or trustees to do or to abstain from doing any particular act in their character as such executors or administrators or trustees:

(*c*) See *ante*, p. 1686.

"(f) The approval of any sale, purchase, compromise, or other transaction:

"(g) The determination of any question arising in the administration of the estate or trust:

he shall in his particulars specify concisely the question or matter upon which the decision of the Court is required: and that he is willing to renounce his right to an order for a general administration of the estate or trust."

Partial administration.

Any such question may be determined without general administration, under Ord. XXII. r. 14 (*d*).

By Ord. XXII. r. 15, "Upon an application for administration or execution of trusts by a creditor or beneficiary under a Will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Judge may, in addition to the powers already existing—

"(a) Order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings:

"(b) When necessary, to prevent proceedings by other creditors, or by persons beneficially interested, make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without the leave of the Judge in person" (*e*).

Injunction.

By Ord. XXII. r. 16, "In any action or matter in which an injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any wrongful act or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Judge may, in addition to giving judgment for such damages and costs as the plaintiff may be entitled to, grant the injunction, either upon or without terms, as may be just.

(*d*) This rule is substituted for the previous rule 11. See R. S. C. Ord. LV. r. 10.

(*e*) This is a new rule, added by the Rules of 1903. See R. S. C. Ord. LV. r. 10a.

"An application under this rule may be made—

"(a) Before the trial or hearing, in which case it shall be made in accordance with Ord. XII. r. 6:

"(b) At or immediately after the trial or hearing, in which case the order, if any, shall be included in the judgment: or

"(c) Subsequently to judgment, in which case it shall be made in accordance with Ord. XII. r. 11, on notice supported by affidavit" (*f*).

Parties aggrieved may appeal.

By sect. 120 of the County Courts Act, 1888, "If any party in any action or matter shall be dissatisfied with the determination or direction of the Judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the Judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court" (*g*).

For the Orders and Rules made for the County Courts, and the procedure therein, the reader is referred to the Annual County Courts Practice.

(*f*) The last paragraph of this rule was added by the Rules of 1903.

(*g*) See R. S. C. 1883, Ord. LIX. rr. 10—17.

PART THE SIXTH.

OF DEATH DUTIES.

BOOK THE FIRST.

OF THE HISTORY AND INCIDENCE OF STAMP DUTIES ON PROBATES AND LETTERS OF ADMINISTRATION, AND OF LEGACY AND SUCCESSION DUTIES, AND THE FINANCE ACT, 1894.

Death duties before the Finance Act, 1894.

AT the date of the passing of the Finance Act, 1894, five death duties were in existence in England: Probate duty, Account duty, Temporary Estate duty (which was imposed for a period of seven years, and would have expired in 1896), Legacy duty, and Succession duty. The first three of these duties, namely, Probate duty, Account duty, and Temporary Estate duty, are superseded in the case of persons dying after the 1st of August, 1894, by Estate duty imposed by the Finance Act, 1894 (57 & 58 Vict. c. 30).

All duties now payable upon the devolution of property upon a death are regulated by the Finance Act, 1894, the Legacy Duty Act, 1796 (36 Geo. III. c. 52), the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and the various amending Acts. It is necessary, however, in order to show the effect of the legislation which has culminated in the Finance Act, 1894, briefly to refer to the earlier Acts of Parliament.

Probate duty.

The earliest duty was the Probate duty, which at first was imposed temporarily for four years in 1694, by 5 & 6 Will. & Mary, c. 21, as a war tax for the purpose of carrying on the war against France. It was levied in the form of a duty of

5*s.* for every skin or piece of vellum or parchment, sheet or piece of paper, upon which any probate of a Will or letters of administration for any estate above the value of 20*l.* should be engrossed or written. In 1697 the duty was continued by 8 & 9 Will. III. c. 25, and in 1698 made permanent by 9 & 10 Will. III. c. 25, when the rate of duty was increased to 10*s.*; additional rates were from time to time imposed, and in 1804, by 44 Geo. III. c. 98, "the duties," as the preamble states, "having become very numerous, intricate and complicated," all former Acts were repealed, and the old duties were replaced by new duties under the management of the Commissioners for Stamps. In 1815 the then existing Acts were repealed, and by the Stamp Act of that year (55 Geo. III. c. 184) an *ad valorem* duty was imposed. This Act remained the basis of Probate duty until the Finance Act, 1894. With a view to encouraging the making of Wills, the Stamp Act of 1815 provided that the duty upon letters of administration should be one-half greater than upon the granting of probate. This provision remained in force till 1880, when, by the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), the rate of duty for probate and letters of administration was made uniform. Such uniform rate was preserved by the succeeding Customs and Inland Revenue Act, 1881 (44 Vict. c. 12, s. 27), which, however, exempted all personal estates under 100*l.* in value from payment of Probate duty, and required the stamp to be placed on the affidavit of value instead of on the grant itself.

The Stamp Act, 1815 (55 Geo. III. c. 184), further provided the machinery for the collection of the duties, and as amended by subsequent Acts, has remained the basis for the collection of duties.

It has been shown (*a*) that, formerly, if a person died intestate, the King enjoyed the prerogative of seizing his goods; this right, although in some instances granted as a franchise to lords of manors, came to be exercised by the ecclesiastics, who after paying the debts of the intestate and deducting the *partes rationabiles* of the wife and children, disposed of the residue *in pios usus*. The right, however, was confined to personalty, and to the limits of the jurisdiction of the Ordinary; thus if goods were in the jurisdiction of different Ordinaries, each took possession of such goods only as were within his own diocese.

(*a*) *Ante*, p. 312.

The probate of Wills followed, and when by the stats. 31 Edw. III. c. 11 and 21 Hen. VIII. c. 4, the Ordinaries came to grant letters of administration, the same rule was adopted with regard to locality.

At the time of the passing of the Probate Act (20 & 21 Vict. c. 77) in 1857, the Ecclesiastical Courts, *i.e.*, the Courts of the Ordinary and the Prerogative Courts of Canterbury and York, were the Courts in which the validity of Wills was established, or the personalty of intestates was administered. It was the jurisdiction of these Courts which the Probate Act transferred to the Court of Probate, and which subsequently by the Judicature Act was vested in the Probate Division of the High Court of Justice.

An executor or administrator could not, without obtaining probate or taking out letters of administration, deal with property which but for a Will the Ordinary would in early times have been entitled to apply *in pios usus*. Probate duty was payable on property which could not be dealt with by the executor or administrator until probate had been obtained or letters of administration taken out, so that when the duty was made an *ad valorem* duty in 1815 the amount upon which the duty was levied was the value of such part only of the estate as was at the death of the deceased within the jurisdiction of the Court by which the probate or letters of administration were granted. The duty was not payable upon the value of such portion of the estate (if any) as was outside such jurisdiction (*b*).

In Scotland, although there was not a Probate duty, there was a corresponding duty called Inventory duty.

Under the provisions of 21 & 22 Vict. c. 56, power was given to include in the inventory of the personal estate of any person who should have died domiciled in Scotland, any personal estate of the deceased situated in England or Ireland or both (*c*).

In Ireland there was a Probate duty similar to the English Probate duty (*d*).

(*b*) The extent of the personalty upon which Probate duty was payable is dealt with fully in *Att.-Gen.* v. *Dimond*, 1 C. & J. 356. See also the 9th edition of this work, p. 542 *et seq.* It may be sufficient here to remind the reader that judgment debts were assets for the purposes of the jurisdiction of the Ordinary, where the judgment was recorded; leases where the land was situate; specialty debts where the instrument happened to be; and simple contract debts where the debtor resided at the time of the testator's death. See 1 Saud. 274, *a*, note (3).

(*c*) Sect. 8.

(*d*) See 56 Geo. III. c. 56; 5 &

Account duty.

Account duty was imposed for the first time by sect. 38 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), subsequently amended by sect. 11 of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7). It was a Stamp duty imposed to cover certain personal and moveable property, not covered by Probate duty. The property to which the duty was intended particularly to apply consisted mainly of certain property disposed of during the lifetime of a deceased person which if it had passed on death would have been liable to Probate duty. The duty is no longer payable under the name of Account duty, but Estate duty under the Finance Act, 1894, is chargeable upon all property upon which Account duty was before payable.

The Customs and Inland Revenue Act, 1881, made property of this nature liable to Inventory duty in Scotland.

Legacy duty.

Legacy duty was first imposed by the statute 20 Geo. III. c. 28. This Act was followed at short intervals by amending Acts, but by these Acts the duties were imposed merely on the receipts for legacies and shares of residue (*e*). The statute 36 Geo. III. c. 52, after repealing the preceding duties, imposed new ones, not upon the receipts, but upon the legacies and shares of residue themselves. The existing duties are now regulated by 55 Geo. III. c. 184 (together with 36 Geo. III. c. 52), 43 Vict. c. 14, and 44 & 45 Vict. c. 12.

Legacy duty has been left untouched by the Finance Acts, except in respect of exemptions (1894, ss. 1, 5 (2) and 16), the power to accept composition for death duties (1894, s. 13), the rate of interest payable on arrears (1896, s. 18) (*f*).

Succession duty.

Succession duty, imposed by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), made dispositions of real property, and certain classes of personal property before untouched by the Legacy Duty Acts, subject to duty. This Act, as amended by numerous Acts, remains in force, subject however to considerable modifications by the Finance Act, 1894 (*g*).

Temporary Estate duty.

Temporary Estate duty was a duty of 1 per cent. imposed by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7, ss. 5 and 6), upon estates exceeding 10,000*l.*, and was

6 Vict. c. 82; 16 & 17 Vict. c. 59; 25 & 26 Vict. c. 22.

(*e*) See *post*, p. 1768.

(*f*) The incidence of this duty is dealt with in detail, *post*, p. 1763 *et seq.*

(*g*) The incidence of this duty is dealt with in detail, *post*, p. 1798 *et seq.*

charged on both realty and personalty. It is in effect repealed by sect. 1 of the Finance Act, 1894, except as to estates of persons dying before June 1, 1896 in cases where the Estate duty is not leviable under that Act (*h*).

Character of death duties before and after the Finance Act, 1894.

Before the passing of the Finance Act, 1894, the death duties were of two types; the first type, which considered only the amount of the property passing, disregarding relationship, was charged on the corpus of the property and consisted of the Probate, Account and Temporary Estate duties; the second type included the Legacy and Succession duties, and was a charge on the interest of the beneficiary, at rates varying according to the relationship of the beneficiary to the person from whom the interest was derived.

It will be observed that under this system, all classes of property were not equally taxed. Probate duty was only charged on the personal property passing under a Will or on intestacy, and only on such personalty as was within the jurisdiction of the Court granting probate or letters of administration. Account duty brought in other classes of personal property, *e g.* personal property included in voluntary settlements, *donationes mortis causa*, and gifts made within a year of death generally. Personal property included in other than voluntary settlements, and real property of any description, unless devised in trust for sale, were altogether untouched by duties of the first type.

Under the Legacy and Succession Duty Acts also, personal property and real property were unequally taxed. Personalty was charged according to the interest taken by the beneficiary on the principal value. Realty was charged only on the value of the life interest, whether the beneficiary took merely a life interest or an absolute interest in fee simple. Consequently the successor to a leasehold interest sometimes paid more than he would have paid if the property had been freehold. These inequalities were to a very limited extent removed by the additional Succession duty imposed in 1888 (*i*).

Scope of Finance Act, 1894.

The Finance Act, 1894, was passed for the purpose of making all classes of property on a death bear an equal burden of taxation. As has been shown, it abolishes by implication the old Probate duty, Account duty, and Temporary Estate duty, and in their place imposes a duty of a similar type to the Probate

(*h*) See *post*, p. 1828 *et seq.*, and p. 1830, n. (*s*).

(*i*) See Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21; *post*, pp. 1764, n. (*c*), 1805, n. (*o*).

duty, which is of wider scope in its application to personalty, and subjects real property for the first time to this type of tax. As to Legacy and Succession duty, it is sufficient here to say that Legacy duty remains almost untouched, and that Succession duty is (by sect. 18 of the Act) altered by substituting the principal value of the property itself, for the value of the life interest, as the basis of valuation.

The general principle of the Finance Act, 1894, is to charge Estate duty according to the principal value of all property, real or personal, settled or not settled, which passes or is deemed to pass on death.

CHAPTER THE FIRST.

OF THE ESTATE DUTY AND OF THE PROVISIONS OF THE FINANCE ACT, 1894, RELATING THERETO.

ESTATE DUTY.

Grant of Estate Duty.

Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1 and 2. Grant of Estate duty.

"1. IN the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided (*k*), be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called 'Estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty (*l*).

What property is deemed to pass.

"2.—(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

"(a) Property of which the deceased was at the time of his death competent to dispose;

"(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

"(c) Property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland

44 & 45 Vict. c. 12.

(*k*) For savings and exemptions, see sect. 15, *post*, p. 1746 *et seq.*

(*l*) This schedule will be found set out *post*, p. 1761.

Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom; and 52 & 53 Vict. c. 7.

"(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

"(2.) Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes.

"(3.) Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise."

Scope and effect of sects. 1 and 2:

Sects. 1 and 2 are the sections of the Act which impose the duty. Section 1 contains the broad general principle of the Act and is clear and comprehensive; it charges all property which passes on death, whether real or personal, settled or unsettled, according to the principal value. Section 2, which is merely a subsidiary and supplemental section (*m*), was intended to sweep in a few cases which were thought perhaps to be within the spirit though not within the letter of the first section, or else were supposed to be likely to lead to evasion if not made equally subject to Estate duty. The two sections are mutually exclusive, and if a case falls within sect. 1, it cannot come within sect. 2; sect. 1 applies to property passing on death, sect. 2 to property which, though not actually passing on death, for the purposes of sect. 1 is to be deemed to pass on death.

mutually exclusive:

This view of the scope and effect of the two sections was expressed by Lord Macnaghten in the case of *Earl Cowley* v.

(*m*) *Post*, p. 1701.

Inland Revenue Commissioners (*n*). The second Earl Cowley and his son, being respectively tenant for life and tenant in tail, executed a disentailing deed by which they granted certain estates, called the Mornington Estates, to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercising that power, the second earl and his son mortgaged the estates in fee simple to a company as security for a loan, part of which was advanced for the benefit of the second earl and part for the benefit of the son. With part of the loan prior incumbrances on the second earl's life estate were paid off, and the company took an assignment of the debts and all the assignor's rights and powers of recovery as further security for the loan. The second earl and his son then executed a deed of re-settlement, by which the estates were charged with an annuity to the son payable during the second earl's life, and subject thereto were declared to be held in trust for the second earl for life, and after his death for the son for life, with remainders over. Upon the second earl's death, in 1895, the Crown claimed from the son Estate duty upon the gross value of the estates without allowing any deduction in respect either of the mortgage to the company or of the annuity which ceased with the second earl's life. It was held that Estate duty was payable under sect. 1, but that the settled property which passed to the son on the second earl's death was the equity of redemption. Estate duty was therefore only payable on the equity of redemption.

This case, however, must be distinguished from the case of *Att.-Gen.* v. *Lord Montagu* (*o*). There the Dowager Duchess of Buccleuch, as tenant for life in possession of the Ditton property, joined with Lord Montagu and his eldest son, to whom, subject to such life estate, the property was limited to such uses as they should jointly appoint, in a mortgage in fee to secure a loan to Lord Montagu and his eldest son of 27,000*l.* with interest, and by a deed of even date, Lord Montagu and his eldest son covenanted with the duchess to keep her indemnified against the mortgage debt and interest, and assigned an annuity and rent-charge secured upon other property to trustees to keep down the interest on the 27,000*l.*, so that the life estate of the duchess might be wholly exonerated from and indemnified against the mortgage debt. It was held, that in estimating the principal value for Estate duty payable on the

(*n*) [1899] A. C. 198. (*o*) [1904] A. C. 316.

death of the duchess, no deduction could be made on account of the mortgage debt. Lord Davey, in his speech, says: "If this were a simple case of a mortgage by a tenant for life and a remainderman, or by successive tenants for life and the ultimate remainderman, I think that the property would *pro tanto* be taken out of the settlement, as, from the date of the mortgage and on the death of the first tenant for life, the Estate duty could be claimed only on the equity of redemption. But there appear to me to be circumstances in the present case which take it out of the rule. I am not prepared to say—and it is not necessary to express an opinion—whether, if there had been a mere indemnity, such, indeed, as the law would imply from the fact of the mortgage being for the benefit of the remainderman, if there were a mere personal covenant of indemnity to the duchess (to take this concrete case) by Lord Montagu and his son, I am not prepared to say whether that would be sufficient or not. I do not say that it would not be, and I do not say that it would. But in this case it appears to me that we have far more than that. We have what, in my opinion, amounts to an express contract by Lord Montagu and Mr. Montagu with the duchess that under no circumstances, although she had at their request joined in the mortgage in order to effect a mortgage of the fee, should she be called upon to pay anything out of the income of her Ditton property; and provision was made by which, in case any such claim were made upon her, she might have recourse to another fund which was charged for the purpose. The arrangement between the parties was, in fact and in truth, that the duchess should continue to enjoy the whole income of the Ditton estate discharged, as between her and those entitled in remainder, from any liability by reason of her having joined in the mortgage."

Sect. 2 subsidiary and supplemental to sect. 1.

Sect. 2 is a section subsidiary and supplemental to sect. 1. To use the words of Lord Watson, in *Att.-Gen.* v. *Beech* (*p*), "It apparently was anticipated that a Court of law might place upon these words 'which passes on the death of such person,' a construction limited to property which passed in the ordinary sense of the term from the deceased into the possession and property of another person after his death. But the second section of the statute widens that interpretation very much; for it extends it to all cases where a survivor of the deceased takes

(*p*) [1899] A. C. 53.

a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased."

Property passing on the death is deemed to include property classified under four different heads: (a), (b), (c), (d).

Sect. 2 (1) (a).

Sect. 2 (1) (a) deals with property of which the deceased was at the time of his death competent to dispose, whether he exercised his power or not.

By sect. 22 (2) (a), "A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by Will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee" (*q*).

In the case of *In re Scott* (*r*), property devised by a son, which took effect by virtue of the Wills Act, 1837, sect. 33, was held to be property of which he was at the time of his death competent to dispose. John Scott the younger, the son of John Scott the elder, died on January 22nd, 1899: John Scott the elder died after his son on May 12th, 1899: John Scott the younger devised real property to his daughter, and, by virtue of the

(*q*) "The distinction between a person's own property and property which is not his own, but which he can dispose of by Will in any way he pleases by virtue of a power conferred on him, is well established. Such last-mentioned property is not his own in any proper sense; and even if he executes the power by his Will no Probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it. A statute imposing duty on a testator's property generally is not sufficient for this purpose. This was finally established in *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257, affirming *Platt* v. *Routh*, 6 M. & W. 756": *per* Lord Lindley in *Commissioners of Stamp Duties* v. *Stephen*, [1904] A. C. 137, 140.

(*r*) [1900] 1 Q. B. 372; [1901] 1 Q. B. 228. But where sect. 33 of the Wills Act had no application, see *Lord Advocate* v. *Bogie*, [1894] A. C. 83; *Att.-Gen.* v. *Loyd*, [1895] 1 Q. B. 496. And see meaning of expression "competent to dispose" in sect. 21 of the Succession Duty Act, 16 & 17 Vict. c. 51, *post*, p. 1813, note (*h*). And see also 8 & 9 Vict. c. 76, s. 4, *post*, p. 1796.

Wills Act, 1837, sect. 33, the devise took effect as if John Scott the younger had died after his father; it was held that such real property was liable to Estate duty, as being property of which at the time of his death the deceased was competent to dispose: there were, therefore, two successions upon which duty was payable.

Sect. 2 (1) (b).

Sect. 2 (1) (b) taxes property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises to someone on his death by the cesser of such interest (*s*). The sub-section includes (1) property in which the deceased had an interest ceasing on his death, such as a life interest in property comprised in a settlement, a life annuity, or rent-charge charged on or issuing out of any property; (2) property in which some other person had an interest ceasing on the death of the deceased. Sect. 2 (1) (b) has been borrowed and adapted from sect. 5 of the Succession Duty Act; it does not refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass; this reading of the sub-section is supported by the directions for valuing "the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased" contained in sect. 7 (7). Such directions would be unnecessary for the valuation of property which passes, for if property passes it can be valued by considering what it would fetch in the open market (*t*). The words of sect. 2 (1) (b), "to the extent to which a benefit accrues or arises by the cesser of such interest," should be read in conjunction with sect. 7 (7) (*u*).

Tenant for life surrendering life interest to remainderman.

It was contended in *Att.-Gen.* v. *Beech* (*x*), that where a tenant for life of settled property with a power of appointment appointed the property to her son subject to her own life interest, and by a subsequent deed surrendered her life interest to the trustees of the settlement, "to the end and intent that such life interest may merge in the interest in remainder" of

(*s*) See as to what is covered by these words, *Att.-Gen.* v. *Smith-Marriott*, [1899] 2 Q. B. 595; *Re Townsend*, [1901] 2 K. B. 331; *Re Dixon*, [1902] 1 Ch. 248. And cf. sect. 5 of the Succession Duty Act, 1853, *post*, p. 1803, note (*n*).

(*t*) See Lord Macnaghten's judgment in *Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A. C. 198.

(*u*) *Lord Advocate* v. *Maclachlan* (1899), 1 F. 917; W. N. (1900), 204; *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102.

(*x*) [1899] A. C. 53.

her son, and died more than twelve months afterwards, estate duty was payable under sect. 1 or sect. 2 (1) (b); but it was held that the property had passed *inter vivos*, and therefore the death of the mother had nothing to do with the passing of the property; that the property did not pass, and could not be deemed to pass, on her death. Lord Davey, in his speech in *Att.-Gen.* v. *Cowley* (*y*), says: "Since the decision in *Att.-Gen.* v. *Beech*, it cannot be denied that if the tenant for life and remainderman in fee combine to sell settled property, it is thereby taken out of the settlement, and does not pass, and is not to be deemed to pass, on the death of the life tenant. And I think the result must be the same if, instead of selling, they combine to create a mortgage in fee upon the settled property. *Pro tanto* the property is taken out of the settlement, and what passes on the death of the tenant for life is the equity of redemption only, and the benefit accruing or arising in that event is in that equity alone."

Remainderman acquiring interest of tenant for life.

In *Att.-Gen.* v. *De Préville* (*z*), Estate duty was held not payable by a remainderman who acquired the interest of the tenant for life, notwithstanding that the tenant for life died within twelve months after the releasing of the life interest.

63 & 64 Vict. c. 4, s. 11.

By sect. 11 of the Finance Act, 1900, duty is now payable in cases raising facts similar to those in *De Préville's Case* in the case of persons dying after the 31st March, 1900 (*a*).

59 & 60 Vict. c. 28, s. 14.

Exception to passing of property on enlargement of interest of settlor.

To make it clear that sect. 2 (1) (b) does not impose the duty on a mere enlargement of the interest of a settlor, sect. 14 of the Finance Act, 1896, provides that "where property is settled by a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, the property shall not be deemed for the purpose of the principal Act to pass to the settlor on the death of any such other person after the commencement of this Part of this Act, by reason only that the settlor, being then in possession of the property as tenant for life, becomes, in consequence of such death, entitled to the immediate reversion, or acquires an absolute power to dispose of the whole property" (*b*).

This section was considered by Vaughan Williams, L. J., to

(*y*) [1899] A. C. 198, at p. 219.
(*z*) [1900] 1 Q. B. 223, *post*, p. 1709.
(*a*) *Post*, p. 1709.
(*b*) Cf. with this sect. 12 of the Succession Duty Act, 1853, *post*, p. 1807.

be a declaratory provision to make clear what before was subject to doubt (*c*).

Sect. 15 of the Finance Act, 1896, further declares that property which reverts to the disponer shall not be deemed to pass by reason only of its reverter to the disponer in his lifetime, and provides that— 59 & 60 Vict. c. 28, s. 15.

"(1.) Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this Part of this Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponer in his lifetime. Reverter of property to disponer.

"(2.) Where by a disposition of any property any such interest as above in this section mentioned is conferred on two or more persons, either severally or jointly, or in succession, this section shall apply in like manner as where the interest is conferred on one person.

"(3.) Provided that the foregoing sub-sections shall not apply where such person or persons taking the said life or determinable interest had at any time prior to the disposition been himself or themselves competent to dispose of the said property.

"(4.) Where the deceased person was entitled by law to the rents and profits of real property (as defined by sect. 1 of the Succession Duty Act, 1853) of his wife, and has died in her lifetime, such property shall not be deemed for the purpose of the principal Act to pass on his death by reason of her then becoming entitled to the property in virtue of her former interest."

Sect. 2 (1) (c) of the Finance Act, 1894, extends the duty to property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections Sect. 2 (1) (c).

(*c*) *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102, at p. 110. See also *Taylor* v. *Poncia* (1901), 49 W. R. 596.

were re-enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.

Sect. 38 of the Customs and Inland Revenue Act, 1881, provides as follows:—

44 Vict. c. 12, s. 38 (2).

"(2.) The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

"(a) Any property taken as a *donatio mortis causâ* made by any person dying on or after June 1st, 1881, or taken under a [voluntary] disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three (*d*) months before the death of the deceased.

"(b) Any property which a person dying on or after such day having been absolutely entitled thereto, has [voluntarily] caused or may [voluntarily] cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person.

"(c) Any property passing under any past or future [voluntary] settlement (*e*) made by any person dying on or after such day by deed or any other instrument not taking effect as a Will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property" (*f*).

It must be borne in mind that for purposes of applying this section to sect. 2 (1) (c) of the Finance Act, 1894, it is to be deemed to be extended to real property, and the words

(*d*) Extended to twelve months by 52 Vict. c. 7, s. 11.

(*e*) See *Crossman* v. *The Queen*, 18 Q. B. D. 256.

(*f*) See as to exercise of powers of appointment, *Att.-Gen.* v. *Chapman*, [1891] 2 Q. B. 526; *Att.-Gen.* v. *Gosling*, [1892] 1 Q. B. 545.

"voluntary" and "voluntarily" are to be deemed to be omitted.

The Customs and Inland Revenue Act, 1889, s. 11, provides: 52 Vict. c. 7, s. 11.

"(1.) Sub-sect. 2 of sect. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—

"The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

"The description of property marked (b) shall be construed as if the expression 'to be transferred to or vested in himself and any other person' included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with, any other person.

"The description of property marked (c) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of sale thereof.

"The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1st, 1889, on his life, where the policy is wholly kept up by him for the benefit of the donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

It must be borne in mind that for the purposes of the incorporation of this section in sect. 2 of the Finance Act, 1894, the section is to be read as if any reference to a volunteer were omitted therefrom.

The Account Stamp duty payable under the last-mentioned Acts is payable by the donee personally, and not out of the estate of the deceased (*g*).

(*g*) *Re Foster*, [1897] 1 Ch. 484.

The case of *Att.-Gen.* v. *Worrall* (*h*) was decided under these Acts. Hereditaments had been mortgaged to the defendant's father to secure a loan. The sum of 23,924*l.* remaining due upon the mortgage, by a deed made between the defendant's father, the mortgagors, and the defendant, it was agreed that the defendant should purchase the mortgaged property for 24,500*l.*, and it witnessed that in consideration of 575*l.* paid by the defendant to the mortgagors, and in further consideration of the covenant on the part of the defendant thereinafter contained, such covenant being accepted by the defendant's father in satisfaction of his mortgage debt, from which he thereby released the mortgagors and the defendant, the mortgagors and the defendant's father conveyed the mortgaged hereditaments to the defendant in fee simple, discharged from the mortgage debt, and the defendant covenanted to pay to his father an annuity of 755*l.* during his lifetime. The defendant's father died in 1890, leaving a Will, and the Commissioners of Inland Revenue claimed Account duty on the sum of 23,924*l.* It was held that the covenant by the son to pay an annuity to the father prevented the transaction from being a pure and simple gift within the meaning of sect. 11 (1), and that *bonâ fide* possession had not been assumed by the son immediately upon the gift and thenceforward retained to the entire exclusion of the donor or any benefit to him by contract or otherwise. Consequently, duty as claimed by the Commissioners was payable.

If the transaction is intended to be an act of bounty, and not to be a matter of pure business, it must be held to be a gift within the meaning of the above sections as incorporated in sect. 2 (1) (c) of the Act of 1894.

Gift *inter vivos* reserving to donor some benefit is liable to duty:

A gift *inter vivos* which reserves to the donor some benefit, or some part of that which is purported to be given *inter vivos*, is liable to Estate duty (*i*). But duty is not payable under the Acts of 1881 and 1889, where the transfer of the property, whether by way of donation or sale, is absolute and unconditional (*k*).

A transfer absolute and unconditional is not liable.

Estate duty is payable upon the whole amount, even though there may have been partial consideration. In *Att.-Gen.* v. *Johnson* (*l*), Estate duty was held to be payable on the whole of

(*h*) [1895] 1 Q. B. 99.

(*i*) *Earl Grey* v. *Att.-Gen.*, [1900] A. C. 124.

(*k*) *Lord Advocate* v. *Finnigan*, 20 Rettie, 488; W. N. (1896), 101.

(*l*) [1903] 1 K. B. 617.

a sum of 500*l.* paid during the lifetime of the donor to a charitable society, although, according to arrangement, the society was to pay to the donor, and to his wife who survived him, out of the ordinary outgoings of the society an annuity of 25*l.* It was held that the transaction was a gift, and not a *bonâ fide* purchase of an annuity. The *quantum* of profit retained is immaterial, except in so far as it may be evidence of a *bonâ fide* sale.

In *Att.-Gen.* v. *Holden* (*m*), in view of an approaching marriage, the father of the bridegroom agreed to give his son 10,000*l.*, on condition that the bride's father would settle 20,000*l.* on his daughter: He paid over the money in his lifetime, but died within twelve months of the date of payment, and it was held that Estate duty was payable.

It was contended by the Crown in *Att.-Gen.* v. *De Préville* (*n*) that, where a tenant for life of settled property had released his life interest in favour of the remainderman and died within twelve months of such release, Estate duty was payable by the remainderman on the principal value of the property under sect. 2 (1) (c) and sect. 7 (7) of the Finance Act, 1894. But the Court of Appeal decided that Estate duty was not payable: that the word "property" must mean property of the same kind as that dealt with in the antecedent Probate duty legislation, that is to say, property in which the deceased had such an interest that, if he had not parted with it by gift within twelve months before his death, it would have been part of his estate and effects, and therefore have been included in the property on the value of which the duty was granted. The life estate could never have been included in an account, for upon the death of the owner of the life estate it *ipso facto* came to an end, and therefore there was nothing whatever to bring into account. But the duty has now become payable in such a case, since the passing of the Finance Act, 1900. Sect. 11 of that Act provides:—

63 Vict. c. 7, s. 11. Amendment as to property passing on death.

"(1.) In the case of every person dying after March 31st, 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise

(*m*) [1903] 1 K. B. 832. (*n*) [1900] 1 Q. B. 223.

disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bonâ fide* made or effected twelve months before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise.

"(2.) This section shall *inter alia* apply in Scotland to the conveyance or discharge of any life rent in favour of the fiar, or to the propulsion of the fee under any simple or tailzied destination."

Sect. 2 (1) (d).

Sect. 2 (1) (d) of the Finance Act, 1894, includes annuities or other interests whether in existence or not at the time of the decease, and whether purchased or provided by the deceased (*o*) alone or jointly with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

Policies of insurance.

Policies of insurance on the life of the deceased, which are vested in him at his death, are "property" which "passes on" the death under sect. 1, although that which really passed was not the actual money assured, but the benefit of the contract of insurance.

Property "deemed" to be included in property passing on the death within sect. 2 includes the proceeds of policies of insurance on the life of the deceased, if such policies or the moneys thereby assured are within any of the descriptions in the clauses (a) to (d) of that section. The effect of clauses (c) and (d), taken together, in relation to money received under policies of insurance effected by the deceased on his own life, is that the policy moneys, although not vested in the deceased at his death, are liable under clause (c) to duty, if the policies have been wholly kept up by him for the benefit of another. As to policies which are neither vested in the deceased, nor in fact kept up wholly or partially by him for the benefit of others, the liability to duty is under clause (d). This is the effect of the judgment of Palles, C. B., in *Att.-Gen.* v. *Robinson* (*p*). The

(*o*) See *Att.-Gen.* v. *Hawkins*, [1901] 1 Q. B. 285.

(*p*) [1901] 2 I. R. 67. Cf *Lord Advocate* v. *Fleming*, [1897] A. C. 145, as to Succession and Account duties, in similar cases.

facts of that case were as follows: A husband on his marriage in 1843 assigned four policies of insurance to trustees, and his wife assigned 3,500*l.* Under the provisions of the settlement the policies were kept up, and the annual premiums paid, exclusively out of the income of the moneys of the wife. On the death of the husband in 1898 the moneys secured by the policies became payable, and were held to be liable to duty, as being an interest purchased or provided by the deceased in concert or by arrangement. *Att.-Gen.* v. *Dobree* (*q*) was a case also under this sub-section. A sum of money payable under a policy of insurance, effected by a husband on his own life, was settled in trust for the wife for life and upon other trusts. On the death of the husband, who kept up the policy and paid the premiums thereon during his life as he had covenanted under the settlement, it was held that the sum payable under the policy on his death was an interest purchased or provided by the deceased.

In *Att.-Gen.* v. *Murray* (*r*) the facts were as follows: A father effected a policy of insurance on the life of his son, then aged eleven years. After the son had attained the age of twenty-one years, the father, with the approbation of the son and the son's intended wife, assigned the policy of insurance and all moneys assured or to become payable under it to the trustees of the son's marriage settlement upon trust, after the son's death, to invest the insurance moneys and pay the income to the wife for life. After the death of the son (who survived his father) the insurance moneys were paid to and invested by the trustees of the settlement. It was held by the Court of Appeal, that the expression "interest" in sect. 2 (1) (d) of the Act covers money paid under a policy of insurance on the life of the deceased (approving *Att.-Gen.* v. *Robinson, ubi supra*); but held further, that the sum paid under the insurance policy on the son's death was not an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of sect. 2 (1) (d), and that on the death of the son Estate duty was not payable in respect of that sum.

Sect. 2 (1) (d) has been amended as follows by the Finance Act, 1896, s. 16:

"16. The Estate duty due in respect of any annuity or other definite annual sum, whether terminable or perpetual, referred

Amendment of 59 & 60 Vict. c. 28, as

(*q*) [1900] 1 Q. B. 442.

(*r*) [1903] 2 K. B. 64; [1904] 1 K. B. 165 (C. A.).

to Estate duty on annuities.

to in sect. 2 (1) (d) of the principal Act, may, at the option of the person delivering the account, be paid by four equal yearly instalments, the first of which shall be due at the end of twelve months from the date of the death, and after the end of those twelve months interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly, but the duty for the time being unpaid, with interest to the date of payment, may be paid at any time."

Sect. 2 (2). Property situate out of the United Kingdom:

Sect. 2 (2) of the Finance Act, 1894, subjects to duty property passing on the death of the deceased when situate out of the United Kingdom, if, under the law in force before the passing of the Act, Legacy or Succession duty were payable or would be payable but for the relationship of the person to whom it passes (*s*).

It is sufficient here to say that this sub-section introduces the general principle of the Legacy and Succession Duty Acts; that general principle is stated by Mr. Dicey in his book on the Conflict of Laws (*t*) in the following terms: "Legacy duty and Succession duty are imposed on that movable property, and on that movable property only, which the legatee, distributee, or, to use a more general term, the successor, claims under or by virtue of British Law" (*u*).

(*s*) These latter words refer to the case of property passing to the husband or wife of the deceased.

(*t*) Edit. 1896, p. 785.

(*u*) It should be remembered that Probate duty attached on *bona notabilia* in the place where the goods happened to be situate, wholly irrespective of the question of the domicil of the testator: *Fernandes' Executors' Case*, L. R. 5 Ch. App. 314—317. The share of a deceased partner was situate where the business was carried on: *per* Sir J. Hannen, *In the goods of Ewing*, 6 P. D. 23; *Beaven* v. *Master in Equity of the Supreme Court of Victoria*, [1895] A. C. 251. As to shares of partners in realty, see *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275. See also *Forbes* v. *Stevens*, L. R. 10 Eq. 178, and Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22. As to money invested in purchase of land by order of the Lords Justices in Lunacy, see *Att.-Gen.* v. *Ailesbury*, 12 App. Cas. 672. As to mortgages of freehold property outside the United Kingdom, see *Lawson* v. *Commrs. of Inland Revenue*, [1896] 2 I. R. 418; W. N. (1896), 145; *Lord Sudeley* v. *Att.-Gen.*, [1897] A. C. 11; *Re Smyth*, [1898] 1 Ch. 89. In *Stern* v. *The Queen*, [1896] 1 Q. B. 211, it was held that certificates of shares in a foreign company on which a form of transfer and power of attorney has been endorsed and executed in blank may be liable to Probate duty, if they are marketable in this country and are operative by delivery, and are in this country

Liability to Legacy duty

The liability of personal property bequeathed by Will or passing under an intestacy to Legacy duty is governed by sect. 4 of the Revenue Act, 1845 (8 & 9 Vict. c. 76) (*x*), and depends upon the domicil of the testator at the time of his death. If the testator or intestate was domiciled in the United Kingdom, Legacy duty is payable on personal property wherever locally situate. If the testator or intestate was not domiciled in the United Kingdom, neither Legacy duty nor Succession duty is payable on personal property wherever locally situate (*y*).

Liability to Succession duty.

The liability of moveable property wherever locally situate to Succession duty depends upon the meaning of the word "property" in sect. 2 of the Succession Duty Act, 1853. In order to be brought within that section the legatee must be a person who becomes entitled by virtue of the laws of this country (*z*). So, also, it has been held that where recourse must be had to English law in order to enforce the trusts of a deed, Estate duty and Succession duty are payable upon the principal value of all the property which was subject to those trusts at the donor's death (*a*).

Real property situate outside the United Kingdom is subject neither to Legacy duty nor Succession duty (*b*).

Where any property passing on the death of the deceased is situate in a foreign country, in estimating the value of the property for the purposes of Estate duty an allowance is to be made under sect. 7 (4) of the Finance Act, 1894, of the amount of any duty payable in that foreign country in respect of that property (*c*).

Exception for transactions for money consideration.

"**3.**—(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition

within the jurisdiction of the Ordinary (now the Probate Court).

(*x*) *Post*, p. 1796.

(*y*) *Thompson* v. *Adv.-Gen.* (1845), 13 Sim. 153 and 12 Cl. & F. 1; *Att.-Gen.* v. *Napier*, 6 Ex. 217; *Wallace* v. *Att.-Gen.* (1865), L. R. 1 Ch. 1. See *post*, p. 1798, note (*c*), and p. 1846 *et seq.*

(*z*) *Per* Lord Cranworth, L. C., in *Wallace* v. *Att.-Gen.*, *ubi supra.*

(*a*) *Att.-Gen.* v. *Jewish Colonization Association*, [1900] 2 Q. B. 556; [1901] 1 Q. B. 123; where the cases relating to this subject are fully dealt with by Ridley, J. See also *post*, p. 1798, note (*c*).

(*b*) But a share of a partner in real estate abroad, and mortgages of real estate abroad are to be treated as personal estate. See *ante*, p. 1712, note (*u*).

(*c*) See *post*, p. 1724.

the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee (*d*).

"(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of Estate duty."

The object of this section appears to be to prevent the possibility of what in substance might, but for this provision, result in payment of duty twice over upon the same property.

The section creates exceptions in favour of persons who have bought something and paid for it at a price, but who are not to get the benefit of the purchase until the death of the vendor. To come within the section, the transactions must be for money or money's worth (*e*), and not merely in the nature of family arrangements. The cases of *Brown* v. *Att.-Gen.* (*f*) and *Att.-Gen.* v. *Hawkins* (*g*) were decided under this section, the Court holding that on the facts of both cases they disclosed family arrangements and not purchases. In *Att.-Gen.* v. *Smith-Marriott* (*h*), the defendant owned freehold estates in Lincolnshire, charged with the payment of an annual jointure rent-charge, and was also tenant for life of freehold property in Dorsetshire; he wished to get rid of the charge on the Lincolnshire property, and the person entitled to the rent-charge, by agreement with him, released the Lincolnshire estates, and the defendant in consideration granted her an annuity charged on his life interest in the Dorsetshire estates, and secured by policies of insurance on his life. It was contended that this amounted to the creation of a new annuity for full consideration,

(*d*) See as to what constitutes a *bonâ fide* purchase of an annuity, *Att.-Gen.* v. *Johnson*, [1903] 1 K. B. 617, *ante*, p. 1708.

(*e*) Cf. expression "money or money's worth" in sect. 17 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), *post*, p. 1810, and cases there cited.

(*f*) 79 L. T. 572.

(*g*) [1901] 1 Q. B. 285.

(*h*) [1899] 2 Q. B. 595.

but the Court held that the transaction was not the grant of an annuity for full consideration in money or money's worth to the grantor for his own use or benefit within the meaning of sect. 3, but merely a transfer of the security for the rent-charge from one estate to the other, and that the Crown was entitled to the duty.

A contract to be excepted must be *bonâ fide* made in consideration of money or money's worth—words which appear to have been selected for the purpose of excluding the consideration of marriage (*i*).

Aggregation of property to form one estate for purpose of duty.

"4. For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof:

"Provided that any property so passing, in which the deceased never had an interest, [or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased,] shall not be aggregated with any other property but shall be an estate by itself, and the Estate duty shall be levied at the proper graduated rate on the principal value thereof; but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of Estate duty" (*k*).

63 Vict. c. 7, s. 12.

Sect. 4 was amended by sect. 12 of the Finance Act, 1900, as follows:—

Amendment as to aggregation.

"12.—(1.) The exclusion enacted by the proviso to sect. 4 of the Finance Act, 1894, of property from aggregation shall, in the case of every person dying after the passing of this Act, cease to have effect, except as regards property in which the deceased never had an interest.

(*i*) Cf. *per* Lord Westbury in *Floyer* v. *Bankes*, 3 De G. J. & S. 306, a case dealing with the appointment by an ante-nuptial settlement executed before the Property Tax Act of a jointure rent-charge in lieu of dower in favour of the intended wife, without deduction in respect of any future tax. See also *Att.-Gen.* v. *Dobree*, [1900] 1 Q. B. 442; and cf. *post*, p. 1810, note (*y*).

(*k*) Exemptions are contained in sect. 7 (10), sect. 15 (2), sect. 16 (3), of the Act of 1894, and sect. 20 of the Act of 1896.

"Provided that where an interest in expectancy (within the meaning of Part I. of the Finance Act, 1894), in any property has before the passing of this Act been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

"(2.) Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said part, have been liable to Estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

Settled property.

"5.—(1.) Where property in respect of which Estate duty is leviable, is settled by the Will (*l*) of the deceased, or having been settled by some other disposition (*m*) passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

Settlement Estate duty.

"(a) a further Estate duty (called Settlement Estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased (*n*); but

"(b) during the continuance of the settlement the Settlement Estate duty shall not be payable more than once.

"(2.) If Estate duty has already been paid in respect of any settled property since the date of the settlement (*o*), the Estate

(*l*) The words "not competent to dispose of the property" do not apply to property "settled by the Will of the deceased": *Re Palmer*, W. N. (1900), 9.

(*m*) As to meaning of "disposition," see *Att.-Gen.* v. *Dodington*, [1897] 2 Q. B. 373, *post*, p. 1754.

(*n*) Cf. sect. 21 (5), *post*, p. 1754.

(*o*) *Inland Revenue Commrs.* v. *Priestley*, [1901] A. C. 208.

duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property [and who if on his death subsequent limitations under the settlement take effect in respect of such property was *sui juris* at the time of his death or had been *sui juris* at any time while so competent to dispose of the property] (*p*).

"(3.) In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

"(4.) Any person paying the Settlement Estate duty payable under this section upon property comprised in a settlement, may deduct the amount of the *ad valorem* Stamp duty (if any) charged on the settlement in respect of that property.

"(5.) Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty" (*q*).

Before the passing of the Finance Act, 1894, when property was settled by Will, Probate duty was charged once on the *corpus* of the property, and this payment covered all the limitations of the settlement. Under this section property under all kinds of settlements is treated in the same way as property under a settlement made by Will was formerly treated. The duty is chargeable only once during the continuance of the settlement (*r*). In order to prevent any diminution of revenue from settled property by this arrangement, an additional 1 per cent. is levied on all property under settlement.

(*p*) The words in brackets were added by the Amendment Act of 1898 (61 & 62 Vict. c. 10), s. 13.

(*q*) The exemptions from Settlement Estate duty appear to be contained in sects. 5 (1) (a), 5 (5), 16 (3), and 21 (4).

(*r*) See *Inland Revenue Commrs.* v. *Priestley*, [1901] A. C. 208.

Definition of settlement.

The definition of settlement is contained in sect. 22 (i), which provides that "the expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of sect. 2 of the Settled Land Act, 1882, or if it related to real property, would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

The Settled Land Act, 1882, provides as follows:—

Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1).

"2.—(1.) Any deed, Will, agreement for a settlement, or other agreement, covenant to surrender, copy of Court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

S. 2 (2).

"(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement."

The words of sub-sect. 1 of sect. 2 of the Settled Land Act, 1882, "stands for the time being limited to or in trust for any persons by way of succession," have been on more than one occasion subject to judicial interpretation. In *Re Mundy and Roper's Contract* (s), a question was raised whether a vendor, who was tenant for life in possession, could by his conveyance under the Settled Land Acts discharge the land from a jointure limited to his wife, if she should survive him, and from the portions charged on the land in favour of his younger children, but not raisable till after his death. It was held that the vendor was competent to sell and make a good title to the lands discharged from the jointure and portions; that the words "stands for the time being limited to or in trust for any persons by way of succession" have no technical force, and that according to their natural and ordinary meaning they include the case of a jointure and portions for

(s) [1899] 1 Ch. 275. See also *Re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345.

younger children limited to arise on or after the death of a tenant for life and the terms of years limited to trustees to secure them.

In *Att.-Gen.* v. *Owen* (*t*), a testatrix by her Will bequeathed an annuity to her sister and directed that a portion of the estate should be set apart to provide for the payment of the annuity, and subject to such annuity she bequeathed the said portion of her estate to her sons. It was contended by the Crown that Settlement Estate duty was payable under sect. 5, sub-sect. 1, of the Finance Act, 1894, and the Court held that such duty was payable because the property so set apart to provide for the payment of the annuity was property "standing limited to or in trust for persons by way of succession" within the meaning of sect. 2, sub-sect. 1, of the Settled Land Act, 1882.

A bequest by a testator of residuary estate to trustees on trust to pay the income to his wife for life, and after her death to pay an annuity to each of his four daughters for life, and after the death of each of his daughters to raise certain named sums in trust for the children of such daughter who should attain twenty-one, or being females should marry under that age, amounts to a limitation in favour of the testator's grandchildren to take effect upon the death of his daughters, and therefore is a succession in respect of such parties on which Settlement Estate duty is payable (*u*).

Property contingently settled.

Settlement Estate duty is payable in respect of property only contingently settled, though under sect. 14 of the Finance Act, 1898, the duty will be repaid if it be subsequently shown that the contingency has not arisen and cannot arise.

Settlement Estate duty is a duty imposed on that part of the property which is settled, and not on the whole estate, if only part of that estate is settled. A contingent settlement of the whole or part is a settlement of the whole or part as the case may be, and not the less so because there may be by the same instrument a prior disposition of the same property or part of the property, the continuance of which would exclude the contingent settlement altogether (*x*).

(*t*) [1899] 2 Q. B. 253. This case and *Att.-Gen.* v. *Coulson*, [1899] 2 Q. B. 253, were in effect appealed against in *Re Campbell*, [1902] 1 K. B. 113, and were approved of by the Court of Appeal.

(*u*) *Att.-Gen.* v. *Coulson*, [1899] 2 Q. B. 253.

(*x*) *Per* Vaughan Williams, J., in *Att.-Gen.* v. *Fairley*, [1897] 1 Q. B. 698.

61 & 62 Vict. c. 10. s. 14.

Sect. 14 of the Finance Act, 1898, is as follows:—

"14. Where in the case of a death occurring after the commencement of this Act, Settlement Estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not risen, and cannot arise, the said duty paid in respect of such property shall be repaid" (*y*).

Where there was a contingent settlement for a life estate and estates in remainder following on a life estate, which would have been within the exception in sect. 5 (1) (a), the benefit of the exception was held to be excluded (*z*).

Where under a Will a testator directs trustees to apply legacies for the benefit of his children for life and for their issue absolutely, such bequests are settled property notwithstanding there is a power of appointment among issue, or if no issue a general power of appointment. The property stands "for the time being" in trust for the children and their actual or possible issue by way of succession (*a*).

Sect. 5 (2).

As to sect. 5 (2), in *Att.-Gen.* v. *Hay* (*b*), one John Hope Alston was the owner of an absolute reversionary interest in settled personal property on the death of his mother. During his mother's lifetime he made a settlement of his reversionary interest, reserving a life interest to himself, so that on her death the property was settled on himself for life, and then to his children absolutely, and he was not then competent to dispose of the property. Estate duty having been paid on the mother's death, it was contended that, on the death of John Hope Alston, no more Estate duty was payable upon the value of his interest; but the Court held that he was a person who was during the continuance of the settlement competent to dispose of the property within sect. 5 (2).

Sect. 5 (3).

With respect to sect. 5 (3), subsequent limitations under a settlement may continue to subsist notwithstanding that a person may have become absolutely entitled to property and could demand the transfer of it from the trustees. The word "subsist" properly describes any estate created by the settlement which has not come to an end. Such an estate is not the less a limitation because there is no estate limited beyond it; in

(*y*) This section amounts to an adoption by the Legislature of the construction which was put upon sect. 5 (1) (a) in *Att.-Gen.* v. *Fairley*, [1897] 1 Q. B. 698, while mitigating possible hardship. See *Att.-Gen.* v. *Clarkson*, [1900] 1 Q. B. 156.

(*z*) *Att.-Gen.* v. *Fairley*, *ubi supra*.

(*a*) *Lord Advocate* v. *Stewart's Trustees* (1899), F. 416; W. N. (1899), 198.

(*b*) [1899] 2 Q. B. 245.

other words, limitations under the settlement continue until the death of a person who was at the time of his death, during the continuance of the settlement, competent to dispose of such property.

In *Att.-Gen.* v. *Wood* (*c*), a wife settled property upon trust to pay the income to her during the joint lives of herself and her husband, and after the death of one of them, to the survivor for life; and if the wife survived the husband, and there should be no children of the marriage, then in trust for her absolutely. There were no children of the marriage, and on the death of the husband, although the wife was entitled absolutely, it was held that subsequent limitations under the settlement continued to subsist, and that Estate duty was not payable.

With respect to sect. 5 (5), the power of sale conferred by sect. 58 of the Settled Land Act, 1882, upon a tenant in tail in possession of lands settled by Act of Parliament with a restriction upon alienation, does not make such a tenant in tail a person capable of alienating the lands so settled within the meaning of this sub-section (*cc*). Sect. 5 (5).

"*Collection and Recovery of Duty and Value of Property.*

"**6.**—(1.) Estate duty shall be a Stamp duty, collected and recovered as hereinafter mentioned. Collection and recovery of Estate duty.

"(2.) The executor (*d*) of the deceased shall pay (*e*) the Estate

(*c*) [1897] 2 Q. B. 102.

(*cc*) *Re Bolton Estates Act, 1863*, [1904] 2 Ch. 289.

(*d*) See sect. 22 (1) (d) and sect. 23 (11) for meaning of executors, *post*, pp. 1755, 1758.

(*e*) Estate duty is not, like the original Probate duty, merely a Stamp duty, but is one for which the executor is personally accountable: *Re Kingdon and Wilson*, [1902] 2 Ch. 242, 257. In this case Stirling, L. J., who delivered the judgment of the Court, says (p. 256): "We have consulted one of the taxing masters of the Chancery Division, and are informed by him that, from the time of the decision in *In re Remnant* (11 Beav. 603, 613) down to that in *In re Lamb* (23 Q. B. D. 5), it was the settled practice not to include sums paid for Probate duty in bills of costs, and that the taxing masters of the Chancery Division consider that the decision in *In re Lamb* was based on imperfect or inaccurate information, and that the adherence to it has, in their opinion, operated unfairly to clients in the past, and (regard being had to the increased duty now payable) is likely still more so to operate in the future. . . . . We have also consulted one of the registrars of the Probate Division, who is conversant with the taxation of costs in that division, and are informed by him that, although the practice there, so long as he has known it, has been regulated by *In re Lamb*, he is also of opinion that in many cases it leads to injustice being done. In these circumstances we

duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit (*f*), and may pay in like manner the Estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor (*g*), or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment (*h*).

"(3.) Where the executor does not know the amount or value of any property which has passed on the death, he may state in the Inland Revenue affidavit that such property exists but he does not know the amount or value thereof, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account thereof, and to pay both the duty for which he is or may be liable, and any further duty payable by reason thereof for which he is or may be liable in respect of the other property mentioned in the affidavit.

"(4.) Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow.

"(5.) Every estate shall include all income accrued upon the property included therein down to and outstanding at the date of the death of the deceased.

"(6.) Interest [at the rate of 3 per cent. per annum] on the Estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens [and shall form part of the Estate duty] (*i*).

think that *In re Lamb* ought to be overruled, and that payments for Estate duty ought not to be included in bills of costs."

(*f*) See definition sect. 22 (1) (n), *post*, p. 1757, and as to form of affidavit, see sect. 8 (14), *post*, p. 1731.

(*g*) As to what property comes under the control of the executor by the exercise by Will of a general power of appointment, see *post*, p. 1739.

(*h*) In all cases where Estate duty becomes payable for which the executor is not made accountable by this section, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares: *Re Countess of Oxford*, [1896] 1 Ch. 257; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116. Estate duty payable under sect. 5 (5) is payable out of income and not out of capital: *Re Bolton Estates Act, 1863*, [1904] 2 Ch. 289; but cf. *post*, p. 1738.

(*i*) This provision as to interest on Estate duty has been modified

"(7.) The duty which is to be collected upon an Inland Revenue affidavit or account shall be due on the delivery thereof, or on the expiration of six months from the death, whichever first happens.

"(8.) Provided that the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, less income tax, and the first instalment shall be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly; but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and in case the property is sold, shall be paid on completion of the sale, and if not so paid shall be duty in arrear.

Value of property.

"7.—(1.) In determining the value of an estate for the purpose of Estate duty allowance shall be made for reasonable funeral expenses (*k*) and for debts (*l*) and incumbrances; but an allowance shall not be made—

"(a) For debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest, nor

"(b) For any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained, nor

"(c) More than once for the same debt or incumbrance charged upon different portions of the estate;

and any debt or incumbrance (*m*) for which an allowance is

by sect. 18 of the Act of 1896. See *post*, p. 1735. The words within brackets were repealed by sect. 40 of the Act of 1896.

(*k*) As to what funeral expenses are allowable to executors and administrators as against creditors, legatees, and next of kin, see *ante*, p. 737 *et seq.*

(*l*) The corresponding section (sect. 28) of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), referred to debts "payable by law," words which in effect appeared in 5 & 6 Vict. c. 79, s. 23, and as to the meaning of which see *Percival* v. *The Queen*, 3 H. & C. 217.

(*m*) As to meaning of "incumbrances" see sect. 22 (1) (k), *post*,

made shall be deducted from the value of the land or other subjects of property liable thereto.

"(2.) An allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the United Kingdom, or charged on property situate within the United Kingdom), except out of the value of any personal property of the deceased situate out of the United Kingdom in respect of which Estate duty is paid; and there shall be no repayment of Estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioners, that the personal property of the deceased situate in the foreign country or British possession in which the person to whom such debts are due resides, is insufficient for their payment.

"(3.) Where the Commissioners are satisfied that any additional expense in administering or in realising property has been incurred by reason of the property being situate out of the United Kingdom, they may make an allowance from the value of the property on account of such expense not exceeding in any case 5 per cent. on the value of the property.

"(4.) Where any property passing on the death of the deceased is situate in a foreign country (*n*), and the Commissioners are satisfied that by reason of such death any duty is payable in that foreign country in respect of that property, they shall make an allowance of the amount of that duty from the value of the property.

"(5.) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased;

"Provided that, in the case of any agricultural property (*o*), where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value as assessed under Schedule A. of the Income Tax Acts, after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853 (*p*), and making

p. 1756; *Re Meyrick*, [1897] 1 Ch. 99.

(*n*) As to property in British possessions, see sect. 20, *post*, p. 1752.

(*o*) As to meaning of "agricultural property," see sect. 22 (1) (g), *post*, p. 1756.

(*p*) 16 & 17 Vict. c. 51, s. 22, *post*, p. 1814.

a deduction for expenses of management not exceeding 5 per cent. of the annual value so assessed.

"(6.) Where an estate includes an interest in expectancy (*q*), Estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the Estate duty in respect of the rest of the estate, then—

"(a) for the purpose of determining the rate of Estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and

"(b) the rate of Estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained.

"(7.) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

"(a) if the interest extended to the whole income of the property, be the principal value of that property; and

"(b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended (*r*).

"(8.) Subject to the provisions of this Act, the value of any property for the purpose of Estate duty shall be ascertained by the Commissioners in such manner and by such means as they think fit, and, if they authorize a person to inspect any property and report to them the value thereof for the purposes of this Act, the person having the custody or possession of that property shall permit the person so authorized to inspect it at such reasonable times as the Commissioners consider necessary.

"(9.) Where the Commissioners require a valuation to be made

(*q*) As to meaning of "interest in expectancy," see sect. 22 (1) (j), *post*, p. 1756.

(*r*) See *Att.-Gen.* v. *De Préville*, [1900] 1 Q. B. 223; and Finance Act, 1900, s. 11 (1), *ante*, p. 1704; *Att.-Gen.* v. *Lord Montagu*, [1904] A. C. 316, reversing C. A., [1903] 1 K. B. 482, and restoring decision of Phillimore, J., [1902] 1 K. B. 429; and consider observations of Vaughan Williams, L. J., in *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102, as to the apparent inconsistency between sect. 2 (1) (b), and sect. 7 (7).

by a person named by them, the reasonable costs of such valuation shall be defrayed by the Commissioners.

"(10.) Property passing on any death shall not be aggregated more than once, nor shall Estate duty in respect thereof be more than once levied on the same death.

Supplemental provisions as to collection, recovery, and repayment of and exemption from Estate duty.

"8.—(1.) The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of Estate duty (*s*), and for the exemption of the property of common seamen, marines or soldiers who are slain or die in the service of her Majesty (*t*), and for the purpose of payment of sums under one hundred pounds without requiring representation (*u*), as if such law and practice were in terms made applicable to this part of this Act.

"(2.) Sects. 12 to 14 of the Customs and Inland Revenue Act, 1889 (*x*), and sect. 47 of the Local Registration of Title (Ireland) Act, 1891 (*y*), shall apply as if Estate duty were therein men-

(*s*) See *post*, p. 1729, notes (*d*) and (*e*), and p. 1732, note (*k*). Proceedings by Information by the Crown to recover duty are regulated by Part II. of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), and Rules of Court of 14th March, 1866. See Highmore on the Inland Revenue Regulation Acts, p. 30; and see R. S. C. Ord. LXVIII. and *post*, p. 1827, note (*k*).

(*t*) The property of common seamen, marines or soldiers, who are slain or die in the service of his Majesty is exempt from all Stamp duties.

Sect. 14 of the Finance Act, 1900, further enacts as follows:—

"(1.) Where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit, or in the case of duty already paid, repay, up to an amount not exceeding 150*l.* in any one case, the whole or any part of the Death duties (within the meaning of sub-sect. 3 of sect. 13 of the Finance Act, 1894), leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose of Estate duty of the property so passing does not exceed 5,000*l.*

"(2.) This section shall take effect in the case of any person dying since the 11th day of October, 1899."

(*u*) See *ante*, p. 368. Such estates were exempt from duty by virtue of 27 & 28 Vict. c. 56, s. 5. See also *post*, p. 1750, note (*l*).

(*x*) See *post*, pp. 1862, 1863.

(*y*) This section charges registered land with Succession duty, and other burdens.

tioned as well as Succession duty, and as if an account were not settled within the meaning of any of the above sections until the time for the payment of the duty on such account has arrived.

"(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which Estate duty is payable upon the death of the deceased, and shall be accountable for the Estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

"(4.) Where property passes on the death of the deceased, and his executor is not accountable for the Estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession (*z*), and also, to the extent of the property actually received or disposed of by him, every trustee (*a*), guardian, committee, or other person in whom any

(*z*) *Re Dixon*, [1902] 1 Ch. 248; *Berry* v. *Gaukrodger*, [1903] 2 Ch. 116.

(*a*) By stat. 48 Geo. III. c. 149, s. 35, it is enacted, that "The probate of the Will of any person deceased, or the letters of administration of the effects of any person deceased, &c., &c., shall be deemed and taken to be valid and available by the executors or administrators of the deceased, for recovering, transferring, or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee, notwithstanding the amount or value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be) shall not be included in the amount or value of the estate in respect of which the Stamp duty was paid on such probate or letters of administration."

And by sect. 36 of the same statute, it is provided, that where the executors or administrators of any person deceased shall be desirous of transferring, or of receiving the dividends of any share standing in the name of the deceased, of and in any government or parliamentary stocks or funds, transferable at the Bank of England, or of and in the stock and funds of the Governor and Company of the Bank of England, or of and in the stock and funds of any other company, corporation or society whatever, passing by transfer in the books of such company, corporation, &c., under any such probate or letters of administration, and shall allege that the deceased was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the Bank and any other corporation, &c., or their officers may, for their indemnity, require an affidavit or affirmation of the fact, as in sect. 37 is mentioned, if it shall not otherwise

interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested

appear, and thereupon may permit such executors or administrators to transfer the stock or fund in question, and receive the dividends thereof, without regard to the Stamp duty on the probate or letters. And where the executors or administrators of any person deceased shall have occasion to recover any debt or other personal estate due to the deceased, and shall allege that he was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the person liable to pay such debt, may require a like affidavit as aforesaid, and thereupon make over such debt or effects to such executors, &c., regardless of such Stamp duty as aforesaid; and where the executors, &c., of any person deceased shall have occasion to assign or transfer any debts due to the deceased, or any chattels real, or other personal estate, whereof or whereto the deceased was possessed or entitled, and shall allege that the same were due to, or vested in him, either wholly or partially, as a trustee, the person to whom or for whose use such debts, chattels real, &c., shall be proposed to be assigned, may require such affidavit as aforesaid, and thereupon accept such assignment or transfer, regardless of such Stamp duty as aforesaid.

And by sect. 37 of the same statute, upon any requisition as in sect. 36, such executors or administrators, or some person to whom the fact shall be known, shall make a special affidavit or affirmation of the facts, stating the property in question, and that the deceased had not any beneficial interest in the same, or no other than shall be therein set forth, but was possessed of or entitled thereto, wholly or in part, in trust for some other person, whose name or other description shall be specified, or for such purposes as shall be therein specified, and that the beneficial interest of the deceased, if any, in the property in question, does not exceed a certain value, also therein specified, according to the best estimate that can be made thereof, if reversionary or contingent: and that the value of the estate for which the Stamp duty was paid on the probate or letters is sufficient to cover all such beneficial interest, as well as the rest of such personal estate of the deceased, and for which such probate or letters have been granted, as far as the same has come to the knowledge of such executors or administrators; and where such affidavit or affirmation is made by any other person than the executors or administrators of the deceased, they also shall make an affidavit or affirmation that the same is true, to the best of their knowledge, and that the property in question is intended to be applied accordingly: which affidavits or affirmations shall be sworn before a Master in Chancery, and shall be delivered to the party requiring the same, and be sufficient indemnity to them; and if any person making such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of the matters therein contained, such persons shall, on conviction, be liable to the pains inflicted on persons guilty of perjury.

in possession by alienation or other derivative title (*b*) shall be accountable for the Estate duty on the property, and shall, within the time (*c*) required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property.

"(5.) Every person accountable for Estate duty, and every person whom the Commissioners believe to have taken possession of or administered any part of the estate in respect of which duty is leviable on the death of the deceased, or of the income of any part of such estate, shall, to the best of his knowledge and belief, if required by the Commissioners, deliver to them and verify a statement of such particulars together with such evidence as they require relating to any property which they have reason to believe to form part of an estate in respect of which Estate duty is leviable on the death of the deceased.

"(6.) A person who wilfully fails to comply with any of the foregoing provisions of this section shall be liable to pay 100*l.*, or a sum equal to double the amount of the Estate duty, if any, remaining unpaid for which he is accountable, according as the Commissioners elect: Provided that the Commissioners, or in any proceeding for the recovery of such penalty the Court, shall have power to reduce any such penalty (*d*).

"(7.) Estate duty shall, in the first instance, be calculated at the appropriate rate according to the value of the estate as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty shall, unless a certificate of discharge has been delivered under this Act, be payable, and be treated as duty in arrear (*e*).

(*b*) The language of this sub-section would appear to have been taken largely from sect. 44 of the Succession Duty Act, 1853, *post*, p. 1823.

(*c*) *I.e.*, within six months after the death: see sect. 6 (4).

(*d*) For provisions in earlier Acts as to penalties, see 55 Geo. III. c. 184, s. 37, as to penalty for not proving Will or taking of administration within a given time after in any manner administering (*ante*, p. 233); and sect. 43 as to penalty for not paying the full duty on probates, &c. in a given time after discovery of too little paid at first; 28 & 29 Vict. c. 104, ss. 57, 58; 44 Vict. c. 12, s. 40; and 52 Vict. c. 7, s. 8.

(*e*) Sect. 32 of the Customs and Inland Revenue Act, 1881 (44 Vict.

"(8.) The Commissioners on application from a person accountable for the duty on any property forming part of an estate shall, where they consider that it can conveniently be done, certify the amount of the valuation accepted by them for any class or description of property forming part of such estate.

"(9.) Where the Commissioners are satisfied that the Estate duty leviable in respect of any property cannot without excessive sacrifice be raised at once, they may allow payment to be postponed for such period, to such extent, and on payment of such interest not exceeding 4 per cent. or any higher interest yielded by the property, and on such terms, as the Commissioners think fit.

"(10.) Interest on arrears of Estate duty shall be paid as if they were arrears of Legacy duty (*f*).

"(11.) If after the expiration of twenty years from a death upon which Estate duty became leviable any such duty remains unpaid, the Commissioners may, if they think fit, on the appli-

c. 12), enacts that: "If at any time it shall be discovered that the personal estate and effects of the deceased were, at the time of the grant of probate or letters of administration, of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit, with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as the said Commissioners may in the circumstances think proper."

And sect. 40 enacts that: "If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inventory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of Probate, Legacy, or Succession duties."

(*f*) This section is repealed by the Finance Act, 1896, s. 40. And see sect. 18 of the same Act, *post*, p. 1735. Under 52 Vict. c. 7, s. 8 (2), interest at 4 per cent. on arrears of duty was recoverable, but acceptance of arrears with interest was an absolute waiver of penalties.

cation of any person accountable or liable for such duty or interested in the property, remit the payment of such duty or any part thereof or any interest thereon (*g*).

"(12.) Where it is proved to the satisfaction of the Commissioners that too much Estate duty has been paid, the excess shall be repaid by them, and in cases where the over-payment was due to over-valuation by the Commissioners, with interest at 3 per cent. per annum.

"(13.) Where any proceeding for the recovery of Estate duty in respect of any property is instituted, the High Court shall have jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property.

"(14.) All affidavits (*h*), accounts, certificates, statements, and forms used for the purpose of this part of this Act shall be in such form, and contain such particulars, as may be prescribed (*i*), and if so required by the Commissioners shall be in duplicate, and accounts and statements shall be delivered and verified on oath and by production of books and documents in the manner prescribed, and any person who wilfully fails to comply with the provisions of this enactment shall be liable to the penalty above in this section mentioned.

"(15.) No charge shall be made for any certificate given by the Commissioners under this Act.

"(16.) The Estate duty may be collected by means of stamps or such other means as the Commissioners prescribe.

(*g*) Purchasers and mortgagees are exempted from liability after a specified period, under sect. 8 (2), above.

(*h*) Sect. 29 of the Act of 1881 enacts that: "The affidavit to be required or received from any person applying for probate or letters of administration in England or Ireland shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debt and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of her Majesty's Treasury; and the Commissioners of Inland Revenue shall provide forms of affidavit stamped to denote the duties payable under this Act."

The Finance Act, 1900, s. 13 (2), provides that: "The Commissioners of Inland Revenue may, if they think fit, accept a statement by or on behalf of any accountable person as a correction of any Inland Revenue affidavit or account within the meaning of Part I. of the Finance Act, 1894, for the purposes of that Act and the Acts amending that Act, without requiring that statement to be verified on oath."

(*i*) *I.e.*, by the Inland Revenue Commissioners. See sect. 22 (1) (o), *post*, p. 1757.

"(17.) The form of certificate required to be given by the proper officer of the Court under sect. 30 of the Customs and Inland Revenue Act, 1881, may be varied by a Rule of Court in such manner as may appear necessary for carrying into effect this Act (*k*).

"(18.) Nothing in this section shall render liable to or accountable for duty a *bonâ fide* purchaser for valuable consideration without notice (*l*).

Charge of Estate duty on property, and facilities for raising it.

"9.—(1.) A rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable consideration without notice (*l*).

"(2.) On an application submitting in the prescribed (*m*) form the description of the lands or other subjects of property (whether hereditaments, stocks, funds, shares, or securities), and of the debts and incumbrances (*n*) allowed by the Commissioners in assessing the value of the property for the purposes of Estate duty, the Commissioners shall grant a certificate (*o*) of the Estate duty paid in respect of the property, and specify the debts and incumbrances so allowed, as well as the lands or other subjects of property.

"(3.) Subject to any repayment of Estate duty arising from want of title to the land or other subjects of property, or from the existence of any debt or incumbrance (*n*) thereon for which under this Act an allowance ought to have been but has not been made, or from any other cause, the certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid:

(*k*) Sect. 30 of the Customs and Inland Revenue Act, 1881, is as follows: "No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account."

(*l*) Cf. sect. 11 (4), *post*, p. 1744.

(*m*) Sect. 22 (1) (o), *post*, p. 1757.

(*n*) Sect. 22 (1) (k), *post*, p. 1756.

(*o*) See sect. 8 (15), *ante*, p. 1731.

Provided that any such repayment of duty by the Commissioners shall be made to the person producing to them the said certificate.

"(4.) If the rateable part of the Estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned.

"(5.) A person authorized or required to pay the Estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof (*p*).

"(6.) A person having a limited interest in any property, who pays the Estate duty in respect of that property, shall be entitled to the like charge, as if the Estate duty in respect of that property had been raised by means of a mortgage to him (*q*).

"(7.) Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any Estate duty in respect of property comprised in the settlement and held upon the same trusts.

(*p*) The general rule that, in the absence of special circumstances, the tenant for life of a settled estate is bound to keep down the interest on charges on the inheritance, is not affected by the Finance Acts, 1894 and 1896; so that, although under the power given to him by sect. 9 (5) of the Act of 1894, he may charge the inheritance with instalments of Estate duty payable by him under sect. 6 (8), he cannot also charge it under sect. 9 (5) with the interest on the unpaid portion of the duty unless he can show that such interest has been "properly incurred by him": *Re Earl Howe's Settled Estates*, [1903] 2 Ch. 69.

(*q*) *Laurie's Case*, [1898] 2 I. R. 636; *Re Mexborough* (1902), 86 L. T. 331, where a legatee to whom a legacy was given for the express purpose of and not merely with the motive of securing payment thereby of the Estate duty on the testator's estates, was held not to be entitled to recoup himself by means of a charge under this section.

The above sections (sects. 6, 7, 8, 9) make provision for the valuation of property, and for the collection and recovery of Estate duty, and provide facilities for raising such duty on property which does not pass to the executor as such.

The person who has to pay over the duty to the Crown is either the executor under sect. 6 (2), or the persons mentioned in sect. 8 (4). Under sect. 6 (2) the executor *must* pay the Estate duty in respect of all personal property (wherever situate) of which the deceased was competent to dispose at his death, and *may* pay the duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the executor's control, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.

Although his liability to pay the duty to the Crown is limited to the personal property of which the deceased was competent to dispose at his death, the executor must, under sect. 8 (3), specify in the accounts annexed to the Inland Revenue affidavit all the property, real and personal, in respect of which Estate duty is payable on the death of the deceased, whether it is the deceased's property or not.

Real estate does not "pass to the executor" within the meaning of sect. 9 (1).

In *Re Palmer* (*r*), Buckley, J., held that the language of sect. 9 (1) of the Finance Act, 1894, must be construed with reference to the law as it stood at that time, and not in accordance with the provisions of the Land Transfer Act, 1897, and therefore real estate did not "pass to the executor," and it was charged with a rateable part of the Estate duty. This decision was followed by Kekewich, J., in *Re Sharman* (*s*).

Where the executor is not accountable for the Estate duty in respect of property which passed on death, sect. 8 (4) provides that every person to whom any property so passed for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the Estate duty on the property.

Estate duty for which

In all cases where Estate duty becomes payable for which

(*r*) W. N. (1900), 9.

(*s*) [1901] 2 Ch. 280.

the executor is not made accountable under sect. 6 (2), the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares (*t*). The scheme of the Finance Act, 1894, is that Estate duty on an estate passing on a death is chargeable on the estate as a whole, without regard to tenancies for life or other particular interests, and that it is to be levied on the whole inheritance (*u*).

executor is not accountable under sect. 6 (2) must be paid ultimately by persons beneficially entitled.

Where the executor pays the Estate duty, payment is to be made on delivery of the Inland Revenue affidavit (*x*), and nothing beyond the affidavit is in such case required. When the executor is not liable or does not in fact pay, the duty is collected upon an account setting forth the particulars of the property (*y*).

Executor pays Estate duty on delivery of Inland Revenue affidavit: in other cases the duty is collected upon an account.

The duty is due upon the delivery of the Inland Revenue affidavit or account, or on the expiration of six months from the death, whichever happens first, and simple interest is now payable under sect. 18 of the Finance Act, 1896, which enacts as follows:—

59 & 60 Vict. c. 28, s. 18.

"18.—(1.) Simple interest at the rate of 3 per cent. per annum without deduction for income tax shall be payable upon all Estate duty from the date of the death of the deceased, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty.

Interest upon Estate duty and other death duties.

"(2.) The foregoing provision shall apply to the interest on all death duties as defined by sect. 13 of the principal Act in like manner as if it were herein re-enacted and made applicable to those duties.

"(3.) The Commissioners of Inland Revenue may remit the interest on any of such death duties where the amount appears to them to be so small as not to repay the expense and trouble of calculation and account."

Estate duty is to be borne by the estate, both by that portion which passes to the executor, and also by that which does not pass to the executor. But sect. 9 (1) provides that a rateable

How the Estate duty is to be borne.

(*t*) In *Re Countess of Orford*, [1896] 1 Ch. 257; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116, where pecuniary legatees whose legacies were charged upon realty were held liable to contribute to the duty.

(*u*) In *Re Parker-Jervis*, [1898] 2 Ch. 643.

(*x*) Sect. 6 (2).

(*y*) Sect. 6 (4).

part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; and by sect. 9 (4) if the rateable part of the Estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property.

It is quite clear that when pecuniary legacies or shares of the residue of a testator's personal estate are given absolutely, the Estate duty must be borne by the general residue, and is not to be paid out of such legacies or shares (*z*); but numerous cases of difficulty have been taken into the Courts for the purpose of determining how the duty must be borne by different portions of the estate.

Sect. 9 (1) has no application to a sum for which trustees are creditors against the estate: only as between persons beneficially interested in an estate.

In *Re Grey* (*a*) a father upon the marriage of his son covenanted with the trustees of his son's marriage settlement that his executors or administrators should within six months after his death pay to them as trustees of the settlement the sum of 25,000*l.*, to be held by them upon the trusts of the settlement. To fulfil his covenant the father devised and bequeathed to his executors by Will the residue of his real and personal estate, upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses, debts and legacies, and to hold the residue upon certain trusts. The executors, after the testator's death, paid the Estate duty in respect of the estate, including the 25,000*l.*, but contended that the duty on the 25,000*l.* should be repaid to them out of that sum by the trustees of the settlement. It was held that the trustees of the settlement were creditors against the whole estate, *i.e.*, the proceeds of the real and personal estate, that therefore sect. 9 (1) and (4), which apply as between persons who are beneficially

(*z*) *Re Webber*, [1896] 1 Ch. 914. In *Re Bourne*, [1893] 1 Ch. 188, it was held that the incidence of the duties imposed by the Customs and Inland Revenue Act, 1881, s. 27, and the Customs and Inland Revenue Act, 1889, s. 5, was governed by the same principles as that which regulated the incidence of the old Probate duty, namely, that it should be borne by the general residuary personal estate. But these principles did not apply to the appointees of various parts of a specific fund in respect of Account duty payable in respect of the trust funds; in such cases the duty had to be borne by all the appointees rateably according to their respective shares, and not by the residuary appointee exclusively: *Re Croft*, [1892] 1 Ch. 652; *Re Shaw*, [1895] 1 Ch. 343.

(*a*) [1896] 1 Ch. 620.

interested in an estate, had no application, and that the duty on the 25,000*l.* must be borne by the executors out of the testator's estate, and this burthen could not be thrown upon the trustees.

In *Re Meyrick* (*b*), on the death of Sir George Meyrick in 1896, his executor paid Estate duty on property of which Sir George was at the time of his death competent to dispose, and also on certain sums of 27,000*l.* and 24,427*l.* These two sums were trust funds comprised in a settlement executed in 1881. Under this settlement Sir George Meyrick settled, in the events which happened, personal property upon trust for himself for life and after his death upon trust that the trustees should appropriate funds of 27,000*l.* and 24,427*l.* and hold them on trusts thereinafter declared for the benefit of two of the settlor's daughters and their issue, and upon trust as to the residue of the trust moneys that the trustee should hold such residue in trust for the settlor, his executors, administrators and assigns. The executor contended that he was entitled to receive from the trustees of the daughters a rateable proportion of the Estate duty he had paid. It was argued *contra* that the Estate duty must be borne exclusively by the executor out of the residuary estate, because the appropriated funds were voluntary incumbrances within sect. 7 (1) upon property passing to the executor as such of the deceased. It was held that the provisions contained in the settlement with regard to those funds were substantive settlements, and that the Estate duty was payable rateably out of the appropriated funds and the residue according to their respective values.

The case of *Re Parker-Jervis* (*c*) raised a question of the payment of Estate duty under two different settlements. The first settlement was made by Mr. Edward Swynfen Parker-Jervis and his son on the marriage of the son, and included a limitation of a jointure of 1,000*l.* a year to the son's wife in case she survived both father and son, which event happened, and further provided that such jointure should be paid to her "without any deduction whatsoever except in respect of income tax." It was held that she was not liable herself to pay the Estate duty, since the words "without any deduction, &c." constituted a contract of exemption, and also amounted to an express provision to the contrary within sect. 14 (1). By the second settlement made by Mr. Edward Swynfen Parker-Jervis, the father, on his

(*b*) [1897] 1 Ch. 99. (*c*) [1898] 2 Ch. 643.

second marriage, he appointed under a power in the first settlement a jointure of 500*l.* a year to his second wife if she survived him (which event happened), and charged it on the settled estate, without, however, using words of exemption as in the case of the 1,000*l.* jointure. It was held that as to the jointure of 500*l.*, the duty was payable by the widow.

How duty chargeable to a jointress is to be ascertained and paid.

This case also raised the question how the duty chargeable to the jointress, whose jointure is chargeable with duty, is to be ascertained. It was held that she must be treated as tenant for life of a sum equivalent to the capitalized value of the jointure, to be ascertained at the same number of years' purchase as the estate as a whole was capitalized for the purpose of duty; and that she must be charged with Estate duty on that sum, but was entitled to throw the burthen of duty charged against her upon the *corpus* of the estate, on the terms of her paying interest to the tenant for life or in tail or in fee in possession at the rate actually paid to the Commissioners of Inland Revenue until payment of the duty, and thereafter at the rate at which the duty could be raised by mortgage of the estate(*cc*).

Contingent legacies and annuities.

The decision is supported by *Re Duke of St. Albans* (*d*), in which case the Duke of St. Albans, by his Will, gave certain legacies and annuities (some contingent) payable primarily out of personalty, charging the realty in aid, but not in exoneration of the personalty if the personalty should prove insufficient. The realty was left to his eldest son for life with remainders over. The Will further provided that if the personalty proved insufficient to pay funeral and testamentary expenses, debts, legacies, and annuities, the deficiency might be raised by the trustees by mortgage of the real estate, but so that the annuities should be paid out of rents and profits, and not by raising a capital sum. The residuary personalty was also charged with payment of the legacies and annuities, and the ultimate residue was left to follow the limitations of the realty. The executors had paid Settlement Estate duty in respect of the contingent legacies and annuities, and the question was raised how this duty ought to be borne as between the residuary estate and the legatees and annuitants. It was held that the contingent legacies must be treated as settled, and, having regard to the decision in *Re Maryon-Wilson* (*e*), the duty must be borne by the legatees; and as regards the annuities, that the decision in

(*cc*) Cf. *Re Bolton Estates Act, 1863*, [1904] 2 Ch. 289, *ante*, p. 1722, n. (*h*).
(*d*) [1900] 2 Ch. 873. (*e*) [1900] 1 Ch. 565.

Att.-Gen. v. *Owen* (*f*) applied to the personalty, and consequently the annuitants must bear their proportion of the Settlement Estate duty according to the rule laid down in *Re Parker-Jervis* (*g*).

Leaseholds.

Leaseholds being property which by law vests in the executor by virtue of his office, Estate duty upon them is payable out of the testator's general personal estate and is not primarily charged on them under sect. 9 (1) (*h*).

Property appointed by Will under a general power.

Where a general power of appointment is exercised by Will, the liability to pay the duty has been the subject of conflicting decisions. In *Re Treasure* (*i*), Kekewich, J., has held that when such general power is exercised by Will, the appointed fund does not pass to the executors by virtue of their office; that Estate duty on such a fund in the absence of any direction to the contrary is payable out of the fund itself; but that where the Will contains a direction to pay testamentary expenses out of the residue, the Estate duty, falling within the description of testamentary expenses, is payable out of the residue; the learned Judge being of opinion that the appointed fund does not pass to the executors as such, having regard to the decisions in *Re Hoskins' Trusts* (*k*) and *Re Philbrick's Settlement* (*l*). This case was followed in two subsequent cases, viz., by Kekewich, J., in *Re Maddock* (*m*), and by Byrne, J., in *Re Power* (*n*). Buckley, J., however, adopted a different view in *Re Moore* (*o*) and *Re Dixon* (*p*), and has decided that where a general power of appointment over a fund is exercised by Will, the appointed fund passes to the executor as such, and consequently that Estate duty in respect thereof is payable by him out of the residue. Buckley, J., did not consider himself bound by *Re Treasure*, both because, having regard to the latter part of the judgment, the opinion of Kekewich, J., on this point was not necessary to the decision, and also because he (Buckley, J.) did not find in it any principle which, having regard to what had been previously decided in *Re Philbrick's Settlement* and *Re Hoskins' Trusts*, he could treat as binding upon him (*q*). Swinfen

(*f*) [1899] 2 Q. B. 253.
(*g*) [1898] 2 Ch. 643.
(*h*) *Re Culverhouse*, [1896] 2 Ch. 251, *ante*, p. 1567.
(*i*) [1900] 2 Ch. 648.
(*k*) 6 C. D. 281.
(*l*) (1865), 34 L. J. Ch. 368.
(*m*) W. N. (1901), 118.
(*n*) [1901] 2 Ch. 659.
(*o*) [1901] 1 Ch. 691.
(*p*) *Re Dixon*, [1902] 1 Ch. 248.
(*q*) See also *ante*, p. 1306, where this question will be found dealt with.

Eady, J., in *Re Fearnsides* (*r*), held that where such appointed property is in fact received by an executor he receives it "as executor," and it passes to him as such within the meaning of the Finance Act, and that the duty is therefore payable out of the residuary estate. In this case, the Will by its terms made the residuary estate liable.

Settled legacies or shares of residue.

In *Re Webber* (*s*) it was held that when pecuniary legacies or shares of the residue of a testator's personal estate are settled by his Will, no part of either the Estate duty or the Settlement Estate duty is to be borne by the settled legacies or shares, but the whole of these duties must be borne by the general residue. That case is still an authority in respect of Estate duty, but the law as to Settlement Estate duty has been altered by the Finance Act, 1896, sect. 19, which is as follows:—

59 & 60 Vict. c. 28, s. 19. Incidence of Settlement Estate duty.

"(1.) The Settlement Estate duty leviable in respect of a legacy or other personal property settled by the Will of the deceased shall (unless the Will contains an express provision to the contrary) (*ss*) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.

"(2.) The Settlement Estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the Commissioners may allow."

The Court of Appeal, however, in *Re Maryon-Wilson* (*t*), considered this provision to be a correction of a wrong decision in order to save further litigation, rather than an alteration of the law, and further, was of opinion that the duty would be borne by the settled property equally, whether the settlement be made by deed or Will.

Appeal from Commissioners.

"10.—(1.) Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, whether on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the Commissioners

(*r*) [1903] 1 Ch. 250.

(*s*) [1896] 1 Ch. 914.

(*ss*) As to what amounts to a provision to the contrary, see *Re Lewis*, [1900] 2 Ch. 176; *Re Pimm*, [1904] 2 Ch. 345, *ante*, p. 753, n. (*n*); *Re Cayley*, [1904] 2 Ch. 781.

(*t*) [1900] 1 Ch. 565.

or such portion of it as is then payable by him, appeal to the High Court within the time and in the manner and on the conditions directed by rules of Court, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the Commissioners the excess shall be repaid.

"(2.) No appeal shall be allowed from any order, direction, determination, or decision of the High Court in any appeal under this section except with the leave of the High Court or Court of Appeal.

"(3.) The costs of the appeal shall be in the discretion of the Court, and the Court, where it appears to the Court just, may order the Commissioners to pay on any excess of duty repaid by them interest at the rate of 3 per cent. per annum for such period as appears to the Court just.

"(4.) Provided that the High Court, if satisfied that it would impose hardship to require the appellant, as a condition of an appeal, to pay the whole or, as the case may be, any part of the duty claimed by the Commissioners or of such portion of it as is then payable by him, may allow an appeal to be brought on payment of no duty, or of such part only of the duty as to the Court seems reasonable, and on security to the satisfaction of the Court being given for the duty, or so much of the duty as is not so paid, but in such case the Court may order interest at the rate of 3 per cent. per annum to be paid on the unpaid duty so far as it becomes payable under the decision of the Court.

"(5.) Where the value as alleged by the Commissioners of the property in respect of which the dispute arises does not exceed 10,000*l.*, the appeal under this section may be to the County Court for the county or place in which the appellant resides or the property is situate, and this section shall for the purpose of the appeal apply as if such County Court were the High Court [Provided that in every such case any party shall have a right of appeal to Her Majesty's Court of Appeal] (*u*).

"(6.) The county council of every county or county borough in Great Britain, shall within twelve months after the commencement of this Act, and may thereafter from time to time, appoint a sufficient number of qualified persons to act as valuers for the purposes of this Act in their respective counties, and shall fix a scale of charges for the remuneration of such persons, and the

(*u*) The proviso at the end of sub-sect. (5) was added by sect. 22 of the Finance Act, 1896.

Court may refer any question of disputed value under this section to the arbitration of any person so appointed for the county in which the appellant resides or the property is situate; and the costs of any such arbitration shall be part of the costs of the appeal (*x*).

(*x*) The following rules of the Supreme Court regulating proceedings in appeals under this section were issued in 1895:—

"1. Any aggrieved person within the meaning of sect. 10, sub-sect. (1) of the Finance Act, 1894, who desires to appeal to the High Court in any of the cases mentioned in the said sub-section shall, within one month from the date of the notification to him or his solicitor of the decision or claim of the Commissioners, deliver to them a written statement of the grounds of such appeal.

"The statement shall state specifically the several grounds upon which the appellant contends that the decision or claim of the Commissioners was erroneous, and if he contends that the value put upon any property by the Commissioners is excessive, he shall therein identify such property and state the value which he contends should be put upon the same.

"2. The Commissioners shall, within a month from the delivery to them of the statement of the grounds of appeal, notify to the appellant or his solicitor whether they have withdrawn the decision or claim appealed against or have determined to maintain the same, either in whole or in part.

"3. At any time thereafter not exceeding one month from the date of the notification by the Commissioners of their determination to maintain their decision or claim either in whole or in part, the appellant may proceed with his appeal by way of petition to the High Court, such petition to be filed in the Queen's Remembrancer's Department of the Central Office, and a copy thereof served by the appellant upon the Commissioners.

"4. Subject to the provisions of these rules the appellant shall not in his petition state or at the hearing be allowed to rely upon any grounds of appeal not specifically set forth in the statement of the grounds of appeal.

"5. Upon the filing of the petition and the service of a copy thereof upon the Commissioners, the matter shall be deemed to be completely at issue, and within seven days thereafter the appellant, or in default thereof the Commissioners, may set the petition down for hearing upon the revenue side of the Queen's Bench Division of the High Court.

"6. The Court or a Judge may order that the petition shall be heard before a Judge of the Chancery Division, and Ord. XLIX. r. 7, shall apply to any such order.

"7. Unless by consent, or otherwise ordered, only oral evidence shall be admitted at the hearing.

"8. In cases where pursuant to r. 7 evidence may be by affidavit, the affidavits shall be filed in the Queen's Remembrancer's Department.

"9. The Crown shall have the same right as an ordinary suitor of administering interrogatories and of obtaining discovery and inspection of documents.

Discharge from and Apportionment of Duty.

Release of persons paying Estate duty.

"**11.**—(1.) The Commissioners on being satisfied that the full Estate duty has been or will be paid in respect of an estate or any part thereof shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for Estate duty the property shown by the certificate to form the estate or part thereof as the case may be.

"(2.) Where a person accountable for the Estate duty in respect of any property passing on a death applies after the lapse of two years from such death to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the Commissioners may determine the rate of the Estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for Estate duty, and the Commissioners shall give a certificate of such discharge.

"(3.) A certificate of the Commissioners under this section shall not discharge any person or property from Estate duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for;

"10. The Court or a Judge may, at any time before or at the hearing, allow the appellant to amend his petition, upon such terms as the Court or Judge may think right.

"11. Ord. XIX. r. 27 of the Rules of the Supreme Court, 1883, shall apply to the petition which shall be deemed to be a pleading within that rule.

"12. Applications for leave to bring an appeal without payment, or on part payment only of the duty, under the provisions of the 4th sub-section of the 10th section of the Finance Act, 1894, shall be by summons before a Judge at Chambers, and the appellant shall deliver to the Commissioners, with the summons, a copy of any affidavit which the appellant intends to use at the hearing of the summons.

"13. These rules may be cited as the Rules of the Supreme Court (Finance Act), 1895, and shall come into operation forthwith."

"(4.) Provided nevertheless that a certificate purporting to be a discharge of the whole Estate duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty notwithstanding any such fraud or failure.

Commutation of duty on interest in expectancy (*y*).

"12. The Commissioners in their discretion, upon application by a person entitled to an interest in expectancy, may commute the Estate duty which would or might, but for the commutation, become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of such duty, and interest being reckoned at 3 per cent.; and on the receipt of such sum they shall give a certificate of discharge accordingly (*z*).

Powers to accept composition for Death duties.

"13.—(1.) Where, by reason of the number of deaths on which property has passed or of the complicated nature of the interests of different persons in property which has passed on death, or from any other cause, it is difficult to ascertain exactly the amount of death duties or any of them payable in respect of any property or any interest therein, or so to ascertain the same without undue expense in proportion to the value of the property or interest, the Commissioners on the application of any person accountable for any duty thereon, and upon his giving to them all the information in his power respecting the amount of the property and the several interests therein, and other circumstances of the case, may by way of composition for all or any of the death duties payable in respect of the property, or interest, and the various interests therein, or any of them, assess such sum on the value of the property, or interest, as having regard to the circumstances appears proper, and may accept payment of the sum so assessed, in full discharge of all claims for death duties in respect of such property or interest, and shall give a certificate of discharge accordingly; (*a*)

(*y*) See corresponding sections in 36 Geo. III. c. 52, s. 33, Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11, and Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 43, as to Legacy duty (*post*, p. 1791, note (*l*)); and as to Succession duty, see 16 & 17 Vict. c. 51, s. 41, *post*, p. 1821.

(*z*) See sect. 7 (6), *ante*, p. 1725, which provides for the payment of duty in respect of an interest in expectancy, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate, or when the interest falls into possession.

(*a*) It will be observed that this

"(2.) Provided that the certificate shall not discharge any person from any duty in case of fraud or failure to disclose material facts.

"(3.) In this section the expression 'death duties' means the Estate duty under this Act, the duties mentioned in the First Schedule to this Act and the Legacy and Succession duties, and the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881. 44 & 45 Vict. c. 12.

Apportionment of duty.

"**14.**—(1.) In the case of property which does not pass to the executor as such (*b*) an amount equal to the proper rateable part of the Estate duty may be recovered by the person, who being authorized or required to pay the Estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (*c*), (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary (*d*).

"(2.) Any dispute as to the proportion of Estate duty to be borne by any property or person, may be determined upon application by any person interested in manner directed by Rules of Court (*e*), either by the High Court, or, where the amount in dispute is less than 50*l.*, by a County Court for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate.

"(3.) Any person from whom a rateable part of Estate duty can be recovered under this section shall be bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners."

section gives the Commissioners power to accept compositions for any death duties. Cf. sect. 33 of the Legacy Duty Act, 1796, *post*, p. 1789.

(*b*) It will be seen that this section only applies to property which does not pass to the executor as such. Where property passes to the executor as such, the duty is payable out of the residue.

(*c*) *Berry* v. *Gaukroger*, [1903] 2 Ch. 116.

(*d*) For instances of express provision to the contrary, see *Re Lord Fitzhardinge*, 80 L. T. 376; *Re Parker-Jervis*, [1898] 2 Ch. 643.

(*e*) An application under this subsection is to be made by originating summons in the Chancery Division, intituled in the matter of the estate of the person upon whose decease the Estate duty has been paid or claimed, and in the matter of the Finance Act, 1894, and otherwise in the form prescribed by Ord. LIV. r. 4b, and App. K., No. 1A. See R. S. C. (Nov.) 1895, Ord. LV. r. 9c; *Re Power* (1899), 47 W. R. 183.

Sect. 14 is intended as a protection to the executor or other person who, as between himself and the revenue, has been called upon to pay the Estate duty, has paid it, and looks for recoupment. The legislature has provided that the person who has been required to pay may recover a rateable part of the duty from the person entitled to any sum charged on the property in respect of which duty has been paid. The section does not affect the incidence of the Estate duty in any way.

In *Wade* v. *Wade* (*f*), the holder of a policy of insurance on his own life for 5,000*l.* by his marriage settlement assigned the policy to trustees upon trust to raise at his death 4,000*l.* to be held on certain trusts, and as to the remaining part of the policy moneys in trust to pay the same to his executors. It was held that sect. 14 (1) was not applicable and that Estate duty must be borne by the moneys remaining after the 4,000*l.* had been paid.

In *Re The Countess of Orford* (*g*), a donee of a power over settled property appointed all the real and personal estate of which she had power under her marriage settlement to dispose of by Will to her executors and trustees upon trust for sale and conversion, and to stand possessed of the proceeds upon the trusts therein mentioned, and by a codicil she directed that the trustees of her Will should out of the moneys arising from such sale and conversion pay to her daughter the sum of 35,000*l.* absolutely free from all limitations and restrictions. It was held that the 35,000*l.* was charged on the property within the meaning of sect. 14 (1), and that the Estate duty was to be borne *pari passu* by the specific and residuary appointees.

Exemptions from Estate duty.

"15.—(1.) Estate duty shall not be payable in respect of a single annuity not exceeding 25*l.* purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person; and if in any case there is more than one such annuity, the annuity first granted shall be alone entitled to the exemption under this section.

(*f*) [1898] 2 Ch. 276. See also *Re Power* (1899), 47 W. R. 183.

(*g*) [1896] 1 Ch. 257. See also *Berry* v. *Gaukroger*, [1903] 2 Ch. 116, *ante*, p. 1735, note (*t*); *Re Duke of St. Albans*, [1900] 2 Ch. 873, *ante*, p. 1738; *Re Meyrick*, [1897] 1 Ch. 99, *ante*, p. 1737; *Re Grey*, [1896] 1 Ch. 620; and *Re Webber*, [1896] 1 Ch. 914, *ante*, p. 1740.

"(2.) It shall be lawful for the Treasury to remit the Estate duty, or any other duty leviable on or with reference to death, in respect of any such pictures, prints, books, manuscripts, works of art or scientific collections, as appear to the Treasury to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes, or to any university, or to any county council or municipal corporation, and no property the duty in respect of which is so remitted shall be aggregated with any other property for the purpose of fixing the rate of Estate duty (*h*).

"(3.) Estate duty shall not be payable in respect of any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid.

"(4.) Estate duty shall not be payable in respect of any advowson or church patronage which would have been free from Succession duty under sect. 24 of the Succession Duty Act, 1853" (*i*).

Sect. 15 (2) is further extended by sect. 20 of the Finance Act, 1896, which enacts:— 59 & 60 Vict. c. 28, s. 20.

Objects of national, scientific, or historic interest.

"(1.) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind by a person not competent to dispose of the same, be exempt from Estate duty, but if it is sold or is in the possession of some person who is then competent to dispose of the same, shall become liable to Estate duty.

"(2.) The person selling the same, or for whose benefit the same is sold, and also the person being in possession and competent to dispose of the same, shall be accountable for the duty, and shall deliver an account in accordance with sect. 8

(*h*) Cf. with this sub-section the stat. 39 Geo. III. c. 73, *post*, p. 1846, as to Legacy duty. It will be observed that this sub-section extends to *any* death duty.

(*i*) See *post*, p. 1815.

of the principal Act, in the case of a sale within one month after the sale, and in the case of a person coming into possession, or if in possession becoming competent to dispose, within six months after he so comes into possession, or becomes competent to dispose."

Small Estates.

Provision for estates not exceeding 1,000*l.* 44 & 45 Vict. c. 12.

"**16.**—(1.) The provisions of sects. 33, 35, and 36 of the Customs and Inland Revenue Act, 1881 (*k*), (relating to the

(*k*) The sections of the Customs and Inland Revenue Act, 1881, referred to in sect. 16 (1), are as follows:—

Sect. 33.—(1.) "Where the whole personal estate and effects of any person *dying on or after the first day of June, 1881* (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of 300*l.*, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the Court or to any officer of Inland Revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of 15*s.* for fees of Court and expenses, and also, in case the estate and effects shall exceed the value of 100*l.*, the further sum of 30*s.* for Stamp duty.

(2.) "If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the value of 300*l.*, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(3.) "The principal registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and of the Probate and Matrimonial Division of the High Court of Justice in Ireland, in communication with the Commissioners of Inland Revenue, shall prescribe the form of notice, and make such regulations as may be necessary with respect to the transmission of notices by officers of Inland Revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorise the grant of probate or letters of administration.

(4.) "Officers of Inland Revenue are hereby empowered to administer all necessary oaths or affirmations, and in the case of letters of administration, to attest the bond and accept the same on behalf of the President or Judge of the Division.

(5.) "Where the estate and effects shall exceed the value of 100*l.*, the Stamp duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of 30*s.*, and no more.

obtaining of representation to the deceased where the gross value of his personal estate does not exceed 300*l.*), shall apply with the necessary modifications to the case where the gross value of the property real and personal in respect of which Estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the Will of the deceased, does not exceed 500*l.*, and where the gross value does not exceed 300*l.* the fixed duty shall be 30*s.*, and where the gross value exceeds 300*l.* and does not exceed 500*l.* the fixed duty shall be 50*s.*

"(2.) All such property may be comprised in the notice under the said sect. 33.

"(3.) Where the net value of the property, real and personal, in respect of which Estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the Will of the deceased, does not exceed 1,000*l.*, such property, for the purpose of Estate duty, shall not be aggregated with any other property, but shall form an estate by itself; and where the fixed duty or Estate duty has been paid upon the principal value of that estate, the Settlement Estate duty and the Legacy and Succession duties shall not be payable under the Will or intestacy of the deceased in respect of that estate.

"(4.) Where representation granted under this section if granted in England extends to property in Ireland, and if granted in Ireland extends to property in England, the principal registrar of the Probate Division of the High Court in England or Ireland, as the case may be, shall affix the seal of the Court thereto on the same being sent to him for that purpose, with the fee of 2*s.* 6*d.*

"Sect. 35. Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding 300*l.*, then a sum equal to the Stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

"Sect. 36. The payment of the sum of 30*s.* for the fixed duty on the affidavit or inventory in conformity with this Act shall be deemed to be in full satisfaction of any claim to Legacy duty or Succession duty in respect of the estate or effects to which such affidavit or inventory relates."

"(5.) Where the fixed duty of 30*s.* or 50*s.* is paid within twelve months after the death of the deceased, interest on such duty shall not be payable.

"*Rates of Estate Duty.*

Scale of rates of Estate duty.

"**17.** The rates of Estate duty shall be according to the following scale:—

Where the Principal Value of the Estate					Estate Duty shall be payable at the Rate per cent. of
	£			£	
Exceeds	- 100 (*l*)	and does not exceed		- 500	One pound.
,,	500	,,	,,	1,000	Two pounds.
,,	1,000	,,	,,	10,000	Three pounds.
,,	10,000	,,	,,	25,000	Four pounds.
,,	25,000	,,	,,	50,000	Four pounds ten shillings.
,,	50,000	,,	,,	75,000	Five pounds.
,,	75,000	,,	,,	100,000	Five pounds ten shillings.
,,	100,000	,,	,,	150,000	Six pounds.
,,	150,000	,,	,,	250,000	Six pounds ten shillings.
,,	250,000	,,	,,	500,000	Seven pounds.
,,	500,000	,,	,,	1,000,000	Seven pounds ten shillings.
,,	1,000,000	.....			Eight pounds.

"The rate of the Settlement Estate duty where the property is settled shall be 1 per cent.

"Provided that for any fractional part of 10*l.* over 10*l.* or any multiple thereof, the Estate duty and the Settlement Estate duty shall be payable at the rate per cent. for the full sum of 10*l.*"

As to persons dying on or after July 1st, 1896, this section was amended by the Finance Act, 1896, as follows:—

59 & 60 Vict. c. 28, s. 17. Estate duty on fractions of 100*l.*

"17. Sect. 17 of the principal Act shall have effect as if there were added at the end thereof the following proviso in substitution for the existing proviso as to fractional parts of 10*l.*:—

"Provided that where the principal value of an estate comprises a fraction of 100*l.* in excess of 100*l.*, or of any multiple of 100*l.*, such fraction shall be excluded from the value of the estate for the purpose of determining both the rate and the amount of duty, except that where the principal value of the

(*l*) It will be noticed that no Estate duty is payable in respect of an estate the principal value of which does not exceed 100*l.* See also sect. 8(1), and 27 & 28 Vict. c. 56, s. 5, *ante*, p. 1726, note (*u*); cf. the similar exemption given by sect. 18 of the Succession Duty Act, 1853, *post*, p. 1811. And see as to Legacy duty, *post*, p. 1763, note (*b*).

estate exceeds 100*l.* and does not exceed 200*l.* the duty shall be 1*l.*"

But as to persons dying after April 9th, 1900, sect. 17 of the Act of 1896 is repealed by sect. 13 (1) of the Finance Act, 1900, which enacts as follows:— 63 & 64 Vict. c. 4, s. 13 (1).

"13.—(1) For the purpose of determining the rate and the amount of duty, the exclusion under sect. 17 of the Finance Act, 1896, of any fraction from the principal value of the estate shall, in the case of every person dying after the passing of this Act, cease to have effect."

Sect. 18 relates to the value for the purpose of Succession duty of a succession to real property arising on the death of a deceased person, where the successor is competent to dispose of the property, and will be found set out in connection with sect. 21 of the Succession Duty Act, 1853 (*m*). Value of real successions for Succession duty.

"*Local Taxation Grant.*

"19. In substitution for the grant out of the Probate duties under the Local Government Act, 1888 (*n*), the Probate Duty (Scotland and Ireland) Act, 1888 (*o*), and the Local Government (Scotland) Act, 1889 (*p*), there shall be paid, out of the proceeds of the Estate duty derived from personal property, such sum as the Commissioners, in accordance with regulations made by the Treasury under those Acts, may determine to be an amount equal to $1\frac{1}{2}$ per cent. on the net value of such of the property in respect of which Estate duty is leviable as would, if this Act had not been passed, have been chargeable with the duty imposed by sect. 27 of the Customs and Inland Revenue Act, 1881, on Inland Revenue affidavits (*q*), and the first-mentioned Acts shall apply, as if the sum so determined were the Probate duty grant or one half of the proceeds of the sums collected in respect of the Probate duties (as the case requires) within the meaning of those Acts (*r*). Adaptation of law as to Probate duty grant. 51 & 52 Vict. cc. 41 and 60. 52 & 53 Vict. c. 50. 44 & 45 Vict. c. 12.

(*m*) *Post*, p. 1814, note (*h*).

(*n*) 51 & 52 Vict. c. 41, s. 21.

(*o*) 51 & 52 Vict. c. 60, s. 1.

(*p*) 52 & 53 Vict. c. 50, s. 21.

(*q*) The section referred to prescribes the varying rates of the duties chargeable on the affidavits.

(*r*) The Acts referred to direct the Commissioners to pay to the Local Taxation Accounts of England, Ireland, and Scotland certain prescribed proportions of the sums collected by them in respect of the Probate duties.

"*British Possessions.*

Exception as to property in British possessions (*s*).

"**20.**—(1.) Where the Commissioners are satisfied, that in a British possession (*t*) to which this section applies, duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the Estate duty payable in respect of that property on the same death.

"(2.) Nothing in this Act shall be held to create a charge for Estate duty on any property situate in a British possession, while so situate, or to authorize the Commissioners to take any proceedings in a British possession for the recovery of any Estate duty.

"(3.) Her Majesty the Queen may, by Order in Council (*u*), apply this section to any British possession, where her Majesty is satisfied that, by the law of such possession, either no duty is leviable in respect of property situate in the United Kingdom when passing on death, or that the law of such possession

(*s*) Cf. sect. 7 (4) as to property in foreign countries.

(*t*) See the Interpretation Act, 1889, s. 18 (2), which enacts that, in every Act passed after the commencement of that Act, "the expression 'British possession' shall mean any part of her Majesty's dominions, exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession."

(*u*) The following are the British possessions to which sect. 20 of the Finance Act has been applied by Order in Council:—

British Possessions.	Date of Order in Council.	British Possessions.	Date of Order in Council.
Bahama Islands	11 May, 1895.	Lagos	16 July, 1895.
Barbados	29 June, 1896.	Leeward Islands	16 July, 1895.
Bermudas or Somers Is.	11 May, 1895.	Manitoba	26 Oct., 1896.
British Columbia	26 Oct., 1896.	Natal	16 July, 1895.
British Guiana	22 Feb., 1896.	New Brunswick	26 Feb., 1897.
Cape of Good Hope	13 Aug., 1895.	Newfoundland	8 March, 1895.
Ceylon	11 May, 1895.	New Zealand	2 Feb., 1895.
Falkland Islands	3 Oct., 1895.	Nova Scotia	20 Oct., 1898.
Fiji	24 Aug., 1895.	Ontario	26 Oct., 1896.
Gambia, The	11 May, 1895.	Quebec	15 Jan., 1897.
Gibraltar	16 July, 1895.	Sierra Leone	8 Feb., 1896.
Gold Coast Colony	16 July, 1895.	South Australia	11 May, 1895.
Hong Kong	11 May, 1895.	Somers Island	11 May, 1895.
India, British (but not extending to any Feudatory Native States.)	2 Feb. 1895.	Straits Settlements	11 May, 1895.
		Tasmania	13 Oct., 1897.
		Tobago	13 Aug., 1895.
		Trinidad	13 Aug., 1895.
Jamaica	3 Aug., 1897.	Victoria	8 Feb., 1896.
Labuan	18 May, 1897.	Western Australia	1 Aug., 1896.

as respects any duty so leviable is to the like effect as the foregoing provisions of this section.

"(4.) Her Majesty in Council may revoke any such Order, where it appears that the law of the British possession has been so altered that it would not authorize the making of an Order under this section.

"*Savings and Definitions.*

"**21.**—(1.) Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a Will or disposition made by a person dying before the commencement of this Part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the Will or disposition took effect had been, competent to dispose of the property. Savings. 44 & 45 Vict. c. 12.

"(2.) Where a person died before the commencement of this Part of this Act, the duties mentioned in the First Schedule to this Act shall continue to be payable in like manner in all respects as if this Act had not passed.

"(3.) Where an interest in expectancy (*x*) in any property has, before the commencement of this Part of this Act, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth (*y*), then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

"(4.) The Settlement Estate duty of 1 per cent. shall not be payable in respect of property settled by a disposition which has taken effect before the commencement of this Part of this Act.

"(5.) Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this Part of this Act, and on his or her death the survivor becomes entitled to the income of the property

(*x*) As to meaning of "an interest in expectancy," see sect. 22 (1), (j), *post*, p. 1756.

(*y*) See *ante*, p. 1714, as to meaning of "money or money's worth."

settled by such survivor, Estate duty shall not be payable in respect of that property until the death of the survivor" (*z*).

Sect. 21 (1). In *Att.-Gen.* v. *Dodington* (*a*), under a marriage settlement made in 1871 personal property belonging to the wife became vested in trustees upon trust for the wife for life, and after her death, if her husband should survive her, upon trust for the husband for life, and after the death of the survivor of them upon trust for such person or persons as the wife should by deed or Will appoint. The wife died in the lifetime of her husband, before the commencement of the Finance Act, 1894, having by her Will appointed the property in favour of certain beneficiaries, and Probate duty was thereupon paid by her executors in respect of the value of the property so appointed after deducting the value of the husband's life interest. The husband died after the commencement of the Act, and it was held that the settlement and Will together constituted a "disposition" by which the property was settled within the meaning of sect. 21 (1), and therefore that Estate duty was not payable on the husband's death in respect of the value upon which Probate duty had been paid.

In *Att.-Gen.* v. *Earl of Londesborough* (*b*), the residuary personal estate of a testator who died in 1849 became vested under his Will in trustees upon trust for investment in land, and to hold the same in trust for two persons in succession for life, with remainder to the defendant in tail male, and Probate duty was paid on the testator's personalty. On the death of the second tenant for life, in 1900, Estate duty was claimed in respect of the land, then subject to the trusts of his Will, which represented the residuary personal estate of the testator. It was held by the Court of first instance that Estate duty was payable, that sect. 21 (1) did not apply, because at the date of the death in respect of which Estate duty was claimed, the settled property was not personal property. But this decision was reversed on appeal (*bb*) on the ground that the material time was not the time of the death of the person on whose death duty was claimed, but the time when the particular property became liable to Probate duty, viz., the time of the death of the original settlor; and that it was not essential, in order that sect. 21

(*z*) Cf. sect. 5 (1) (a), *ante*, p. 1716.

(*a*) [1897] 2 Q. B. 373 (C. A.). The judgment of Rigby, L. J., in this case was approved by the House of Lords in *Commrs. of Inland Revenue* v. *Priestley*, [1901] A. C. 208, *ante*, p. 1716.

(*b*) [1904] 1 K. B. 749.

(*bb*) T. L. R. 8th Nov. 1904.

should apply, that it should continue personal property until the death of the person on whose death duty was claimed.

With respect to sect. 21 (3), it was held in *Re Vernon* (*c*) that an owner of an interest in expectancy, who grants mortgages over such interest during the life of the tenant for life, is not entitled to deductions from the principal value of the property passing on the death of the tenant for life in respect thereof under this sub-section on the death of the tenant for life. The last three lines of this sub-section do not deal with any personal payment by the mortgagor at all, and do not protect him at all; they assume that the duty is payable, and are inserted to protect the mortgage. In this case, Phillimore, J., expressed a view that no duty would be enforceable unless in fact a beneficial interest remained to the taxpayer. Sect. 21 (3).

With respect to sect. 21 (5), in *Att.-Gen.* v. *Strange* (*d*), property belonging to a wife was settled upon trust to pay the income to the husband for life and after his death to the wife for life, and after the death of the survivor of them, upon the following trusts: if the wife should survive the husband, then after his death upon trust for her absolutely; but if she should die in his lifetime, then after his death upon such trusts as the wife should by Will appoint, and in default of appointment for her statutory next of kin. The husband died in November, 1894, which was after the commencement of the Finance Act, 1894, and the wife survived the husband. It was held that sect. 21 (5) did not apply where the survivor of the husband and wife became on the death of the other entitled, not to the income only, but to the corpus of the property settled, and that upon the death of the husband, Estate duty became payable by the wife upon the principal value of the property settled. Sect. 21 (5).

"**22.**—(1.) In this part of this Act, unless the context otherwise requires:— Definitions.

"(a) The expressions 'deceased person' and 'the deceased' mean a person dying after the commencement of this part of this Act:

"(b) The expression 'Will' includes any testamentary instrument:

"(c) The expression 'representation' means probate of a Will or letters of administration:

"(d) The expression 'executor' means the executor or administrator of a deceased person, and includes, as

(*c*) [1901] 1 Q. B. 297; 83 L. T. 535. (*d*) [1898] 2 Q. B. 39.

regards any obligation under this part of this Act, any person who takes possession or intermeddles with the personal property of a deceased person (*e*):

"(e) The expression 'Estate duty' means Estate duty under this Act:

"(f) The expression 'property' includes real property and personal property and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale:

"(g) The expression 'agricultural property' means agricultural land, pasture and woodland, and also includes such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property:

"(h) The expression 'settled property' means property comprised in a settlement:

"(i) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of sect. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust (*f*):

"(j) The expression 'interest in expectancy' includes an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases:

"(k) The expression 'incumbrances' includes mortgages and terminable charges:

"(l) The expression 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression 'on the death' includes 'at a period ascertainable only by reference to the death:'

"(m) The expression 'the Commissioners' means the Commissioners of Inland Revenue:

(*e*) Cf. with this definition sect. 37 of 55 Geo. III. c. 184, and sect. 57 of 28 & 29 Vict. c. 104. And see *New York Breweries Co.* v. *Att.-Gen.*, [1899] A. C. 62.

(*f*) See *ante*, p. 1718.

"(n) The expression 'Inland Revenue affidavit' means an affidavit made under the enactments specified in the Second Schedule to this Act (*g*) with the account and schedule annexed thereto:

"(o) The expression 'prescribed' means prescribed by the Commissioners.

"(2.) For the purposes of this part of this Act—

"(a) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument *inter vivos* or by Will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee:

"(b) A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required (*h*):

"(c) Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose.

"(3.) This part of this Act shall apply to property in which the wife or husband of the deceased takes an estate in dower or by the curtesy or any other like estate, in like manner as it applies to property settled by the Will of the deceased" (*i*).

Application to Scotland.

Application of part of Act to Scotland.

"**23.** In the application of this Part of this Act to Scotland unless the context otherwise requires:—

"(1.) The Court of Session shall be substituted for the High Court:

(*g*) Viz., sect. 38 of 55 Geo. III. c. 184, sect. 117 of 56 Geo. III. c. 56, sect. 10 of 43 Vict. c. 14, and sects. 29 and 32 of 44 & 45 Vict. c. 12.

(*h*) See *post*, p. 1800, note (*h*).

(*i*) See as to the determination of a dower or jointure by death conferring a succession, *post*, p. 1804, note (*n*).

"(2.) 'Sheriff Court' shall be substituted for 'County Court':

"(3.) 'Confirmation' shall be substituted for 'representation':

"(4.) The expression 'receiver of the property and of the rents and profits thereof' means a judicial factor upon the property:

"(5.) The expression 'Inland Revenue affidavit' means the inventory of the personal estate of a deceased now required by law, and includes an additional inventory:

"(6.) The expression 'on delivering the Inland Revenue affidavit' means on exhibiting and recording a duly stamped inventory as provided by sect. 38 of the Act of the 48th year of the reign of King George the Third, Chapter 149:

"(7.) Sect. 34 of the Customs and Inland Revenue Act, 1881, shall be substituted for sect. 33 of that Act, and the Acts referred to in such sect. 34 shall extend to an estate of a gross value not exceeding 500*l.*, and an application under the said Acts may be made to any commissary clerk, and any commissary clerk shall affix the seal of the Court to any representation granted in England or Ireland upon the same being sent to him for that purpose, enclosing a fee of 2*s.* 6*d.*:

"(8.) The expression 'personal property' means moveable property:

"(9.) The expression 'real property' includes heritable property:

"(10.) The expression 'incumbrance' includes any heritable security, or other debt or payment secured upon heritage:

"(11.) The expression 'executor' means every person who as executor, nearest of kin, or creditor, or otherwise, intromits with or enters upon the possession or management of any personal property of a deceased person:

"(12.) The property comprised in any special assignation or disposition taking effect on death shall be deemed to pass on death within the meaning of this Act:

"(13.) The expression 'trustee' includes a tutor, curator, and judicial factor:

"(14.) The expression 'settled property' shall not include property held under entail (*k*):

"(15.) An institute or heir of entail in possession of an entailed estate shall whether *sui juris* or not be deemed for the purposes of this Act to be a person competent to dispose of such estate:

[Provided that for the purposes of sect. 18 of this Act such institute or heir of entail shall not be deemed to be a person competent to dispose of such estate, unless he is entitled to disentail it without obtaining the consent of any subsequent heir of entail, or having the consent of any subsequent heir valued and dispensed with] (*l*).

"(16.) Where an entailed estate passes on the death of the deceased to an institute or heir of entail, who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail or having the consent of such one or more subsequent heirs valued and dispensed with, Settlement Estate duty as well as Estate duty shall be paid in respect of such estate, but neither Estate duty nor Settlement Estate duty shall be payable again in respect of such estate, until such estate is disentailed, or until an heir of entail to whom it passes on or subsequent to the death of the institute or heir first mentioned, and who is entitled to disentail it without obtaining the consent of any subsequent heir or heirs or having the consent of any subsequent heir or heirs valued and dispensed with, dies:

"(17.) Where an institute or heir of entail in possession of an entailed estate, who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail or having the consent of such one or more subsequent heirs valued and dispensed with, has paid Estate duty in respect of such estate, and afterwards disentails such estate, he shall be entitled to deduct from the value in money of

(*k*) See *Lord Adv.* v. *Stewart*, [1902] A. C. 344.

(*l*) The proviso within brackets was added by sect. 23 of the Finance Act, 1896.

the expectancy or interest in such estate of such one or more subsequent heirs, payable by him to them in respect of their consents having been granted or dispensed with, a proper rateable part of the Estate duty paid by him as aforesaid:

"(18.) Where any person who pays Estate duty on any property, and in whom the property is not vested, is by this Act authorized to raise such duty by the sale or mortgage of that property, or any part thereof, it shall be competent for such person to apply to the Court of Session—

"(a) for an order of sale of the property or part of it and in the event of the Court granting such order, it shall provide for the payment out of the price of the amount of the Estate duty which has been paid by such person, and the Court shall thereafter make such order as to the disposal of the surplus, if any, of the price, by way of investment or otherwise, as to the Court shall seem proper; the Court may in such order specify the time and place at which, the person by whom, and the advertisement or notice after which the sale shall be made, and may ordain the person in whom the property is vested to grant a disposition thereof in favour of the purchaser, and if the person in whom the property is vested refuses or fails to do so, the Court shall grant authority to the clerk of Court to execute such disposition, and such disposition so executed shall be as valid as if it had been executed by the person in whom the property is vested; or

"(b) for an order ordaining the person in whom the property is vested to grant a bond and disposition in security over the property in favour of the person who has paid the Estate duty, for the amount of the said duty, and if the person in whom the property is vested refuses, or fails to do so, the Court shall grant authority to the clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed

shall be as valid as if it had been executed by the person in whom the property is vested, and shall be a first charge upon the property after any debt or incumbrance for which an allowance is directed to be made under this Act in determining the value of the property for the purpose of Estate duty;

Provided also that summary diligence shall not be competent thereupon, and that nothing herein contained shall make the duty to be recovered by the methods of these sub-sections (a) and (b) recoverable at any earlier time than if it had been recovered by direct action against the person ultimately liable for the duty:

"(19.) This Part of this Act shall apply to property in which the wife or husband of the deceased takes an estate of terce or courtesy or any other like estate in like manner as it applies to property settled by the Will of the deceased.

Commencement of part of Act.

"24. This Part of this Act shall come into operation on the expiration of the 1st day of August, 1894, in this Part of this Act referred to as the commencement of this Part of this Act."

FIRST SCHEDULE.

Existing Duties referred to.

"1. The Stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit to be required and received from the person applying for probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland (*m*).

"2. The Stamp duties imposed by sect. 38 of the Customs and Inland Revenue Act, 1881, as amended and extended by sect. 11 of the Customs and Inland Revenue Act, 1889, on the value of personal or moveable property to be included in accounts thereby directed to be delivered (*n*).

(*m*) See sects. 1, 5, 13, and 21 of the Act.
(*n*) See *ante*, pp. 1706, 1707.

"3. The additional Succession duties imposed by sect. 21 of the Customs and Inland Revenue Act, 1888 (*o*).

"4. The Temporary Estate duties imposed by sects. 5 and 6 of the Customs and Inland Revenue Act, 1889 (*p*).

"5. The duty at the rate of 1*l.* per cent. which would by virtue of the Acts in force relating to Legacy duty or Succession duty have been payable under the Will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively Estate duty has been paid, or under any other disposition under which Estate duty has been paid" (*q*).

SECOND SCHEDULE.

[The Acts referred to in this Schedule are set out in note (*g*) to sect. 22 (1) (n), *ante*, p. 1757.]

Disclosure of contents of accounts and affidavits, &c.

It may be convenient here to add, in conclusion of this branch of the subject, that information furnished to the Commissioners for revenue purposes is confidential. Copies of affidavits or accounts are supplied to the parties who delivered them or to their solicitors applying on their behalf, but not to other persons without the written consent of such parties, or, if they are dead, the written consent of their legal personal representatives.

Production on subpœna of documents in Court.

The practice of the Commissioners is to decline to produce documents relating to revenue matters on subpœna unless the Judge at the trial should think any particular document ought, in the interest of justice, to be produced.

The Commissioners may refuse to produce documents on the ground that to do so would be prejudicial to the public service (*r*).

(*o*) Viz., the duty of 10*s.* per cent. on the value of the interest of the successor, where the successor shall be the lineal issue or lineal ancestor of the predecessor, and the duty of 1*l.* 10*s.* per cent. on the value of the interest of the successor in all other cases within sect. 10 of the Succession Duty Act, 1853. See *post*, p. 1805.

(*p*) See *ante*, pp. 1695, 1696.

(*q*) See *post*, pp. 1765, 1805.

(*r*) *Brown's Trustees* v. *Inland Revenue* (1897), 35 Sc. L. R. 340; 3 Tax Cas. 598.

CHAPTER THE SECOND.

OF THE STAMP DUTIES ON LEGACIES AND SUCCESSIONS.

SECTION I.

The Legacy Duty Acts.

THE Stamp duties imposed on legacies, and successions to personal estate upon intestacies, are mainly regulated by the stats. 36 Geo. III. c. 52 and 55 Geo. III. c. 184, as modified by the stats. 43 Vict. c. 14, 44 & 45 Vict. c. 12, and 57 & 58 Vict. c. 30.

It is provided by 55 Geo. III. c. 184, as follows:—

Where the Testator, Testatrix, or Intestate, shall have died after the 5th day of April, 1805 (*a*).

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards (*b*) given by any Will or testamentary instru-

(*a*) For the duties payable when the testator or intestate died on or before April 5th, 1805, see Schedule, Part III. of 55 Geo. III. c. 184, and the earlier Editions of this Work.

(*b*) The exemption from duty of legacies or residues under the amount or value of 20*l.* has been abolished by sect. 42 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), which provides that: "Subject to the relief from legacy duty given by sect. 13 of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the Will or intestacy of a person dying on or after the 1st day of June, 1881, although not of an amount or value of 20*l.*, shall be chargeable to the duties imposed by the said Act of the 55th year of King George the Third, chapter 184, as modified by this Act." The sect. 13 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), referred to, provides that where the whole personal estate does not amount to 100*l.* no Legacy duty shall be charged on any part of it. Such estates were exempt from Probate duty by virtue of 27 & 28 Vict. c. 56, s. 5; and by implica-

ment, of any person, who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate (*c*), or out of any moneys to arise

tion under sect. 27 of the Act of 1881. Further, by sect. 36 of the Act of 1881 (44 & 45 Vict. c. 12), *ante*, p. 1749, note (*k*), the payment of the sum of 30*s*. for the fixed duty on the affidavit or inventory in conformity with sect. 33 of that Act, shall be deemed to be in full satisfaction of any claim to Legacy duty or Succession duty in respect of the estate or effects to which such affidavit or inventory relates. These provisions apply only to the case of testators or intestates dying on or after June 1st, 1881, with the exception of the provision for relief of estates under 100*l*. from Legacy duty, which applies to the estates of persons dying after March 24th, 1880. By sect. 16 (1) of the Finance Act, 1894 (*ante*, p. 1748), sects. 33, 35 and 36 of the Act of 1881 are made to apply to the case where the gross value of the property, real and personal, in respect of which Estate duty is payable on the death of the deceased, exclusively of property settled otherwise than by the Will of the deceased, does not exceed 500*l*., and where the gross value does not exceed 300*l*., the fixed duty shall be 30*s*., and where the gross value exceeds 300*l*., and does not exceed 500*l*., the fixed duty shall be 50*s*. And sect. 16 (3) provides that "where the net value of the property, real and personal, in respect of which Estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the Will of the deceased, does not exceed 1,000*l*., such property, for the purpose of Estate duty, shall not be aggregated with any other property, but shall form an estate by itself; and where the fixed duty or Estate duty has been paid upon the principal value of that estate, the Settlement Estate duty and the Legacy and Succession duties shall not be payable under the Will or intestacy of the deceased in respect of that estate." These provisions of the Finance Act, 1894, apply only to persons dying after the 1st August, 1894.

(*c*) But now, by sect. 21 (2) of 51 & 52 Vict. c. 8, it is enacted: "The duties chargeable under the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons shall not be levied and paid under such Acts in respect of any legacy payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the 1st day of July, 1888, or any real or heritable estate, or the rents or profits thereof, which such person shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any money to arise from the sale, mortgage, or other disposition of any such real or heritable estate, or any part thereof; but the duties under the Succession Duty Act, 1853, and the additional duties under this Act shall be levied and paid in respect of every such legacy (whether given by way of annuity or in any other form) as a succession to personal property."

by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815:

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate, of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards (*d*), and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:

And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the moneys to arise from the sale, mortgage, or other disposition, of any real or heritable estate, directed (*e*) to be sold, mortgaged, or otherwise disposed of, by any Will or testamentary instrument of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815:

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased*, or to or for the benefit of *the father or mother, or any lineal ancestor of the deceased;* a duty at and after the rate of 1*l.* per centum on the amount or value thereof (*f*) 1*l.* per cent.

(*d*) See *ante*, p. 1763, note (*b*).

(*e*) As to the construction of this word, see the cases collected, *post*, pp. 1839, 1840.

(*f*) But by sect. 41 of the Act of 1881, it is provided that: "In respect of any legacy, residue, or share of residue payable out of, or

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty at and after the rate of 3*l.* per centum on the amount or value thereof 3*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased;* a duty at and after the rate of 5*l.* per centum on the amount and value thereof 5*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased;* a duty at and after the rate of 6*l.* per centum on the amount or value thereof 6*l.* per cent.

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased;* a duty at and after the rate of 10*l.* per centum on the amount or value thereof 10*l.* per cent.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or

consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of 1*l.* per centum imposed by the Act of the 55th year of King George the Third, chapter 184, shall not be payable." And by sect. 1 of the Finance Act, 1894, the existing duties mentioned in the First Schedule to that Act shall not be levied in respect of property chargeable with Estate duty. The existing duties referred to include "the duty at the rate of 1*l.* per cent. which would, by virtue of the Acts in force relating to Legacy duty or Succession duty, have been payable under the Will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively Estate duty has been paid, or under any other disposition under which Estate duty has been paid."

effects as aforesaid (*g*), shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits under any Will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

EXEMPTIONS.

Legacies, and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife (*h*) of the deceased, or to or for the benefit of any of the Royal Family.

And all legacies which were exempted from duty by the Act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty (*i*).

Powers and provisions of former Acts to extend to 55 Geo. III. c. 184.

By sect. 8 of the statute, it is provided, that all the powers and provisions, clauses, regulations, and directions, fines, forfeitures, pains and penalties, contained in the former Acts relating to the repealed duties, shall extend to the duties granted by the present. It is therefore necessary to recur to the provisions of the earlier statutes.

20 Geo. III. c. 28.

By the statute 20 Geo. III. c. 28, certain Stamp duties were imposed for every receipt or other discharge for any legacy left by any Will or other testamentary instrument, or for any share or part of a personal estate divided by force of the Statute of Distributions, or the custom of any province or place: and by sect. 3, it was enacted, that no such receipt unstamped should be pleaded or given in evidence in any Court.

(*g*) See *post*, p. 1841.

(*h*) A legacy, in order to fall within this exception, must be for the *absolute* benefit of the husband or wife: Therefore bequests by a husband to his wife "for her and her family," or "to maintain her and our children," if they are given so as to create a trust as between the widow and children (see the cases collected, *ante*, p. 888), are liable to the duty in respect of the interests of the children: *Re Harris*, 7 Exch. 344. See also *Newill* v. *Newill*, L. R. 7 Ch. 253; *Mackett* v. *Mackett*, L. R. 14 Eq. 49. See also the exemptions in favour of a husband or wife under the Finance Act, 1894, s. 5 (1) (a) (*ante*, p. 1716), and s. 21 (5) (*ante*, p. 1754), and under the Finance Act, 1896, s. 15 (4) (*ante*, p. 1705).

(*i*) See *post*, p. 1846.

23 Geo. III. c. 58.

By the statute 23 Geo. III. c. 58, additional Stamp duties were imposed: And by sect. 8, it was enacted, that the receipts, &c., should be stamped before written upon.

29 Geo. III. c. 51.

By the statute 29 Geo. III. c. 51, additional duties were imposed, which, as well as the duties imposed by the preceding Acts, were repealed by the statute 36 Geo. III. c. 52.

By these statutes, it will be observed, the duties were imposed merely on the *receipts* for legacies and shares of residue: But this mode of imposition was found to be disadvantageous to the revenue; inasmuch as, if executors or administrators chose to rely on the good faith of legatees or next of kin, and to run the risk of taking no receipts from them, the duties were altogether evaded (*k*).

Stat. 36 Geo. III. c. 52.

To obviate this, the Legacy Duty Act, 1796 (36 Geo. III. c. 52), after repealing the preceding duties, imposes new ones, not upon the receipts, but upon the legacies and shares of residue themselves: And after enacting, by sect. 27 (*l*), that no legacy, &c., shall be paid without a receipt, proceeds, by sect. 28, to lay a penalty on persons paying or receiving legacies, &c., without receipts stamped in pursuance of the Act: But it is provided, by sect. 41, that the receipt so stamped shall not be required to have a receipt stamp also.

As a due compliance with the provisions of this Act of Parliament is so necessary for the proper performance of the office of executor or administrator, it is judged expedient to insert in this place, *verbatim*, some of its most material enactments.

Duties to be paid by executors or administrators,

By sect. 6, it is enacted, "That the duties hereby imposed shall, *in all cases in which it is not hereby otherwise provided*, be accounted for, answered, and paid (*m*) by the

(*k*) See *Green* v. *Croft*, 2 H. Black. 33, 34; *Hill* v. *Atkinson*, 2 Meriv. 53.

(*l*) *Post*, p. 1784.

(*m*) By sect. 12 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), it is provided as follows: "When an executor, administrator or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to Legacy duty or Succession duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund. Such certificate shall not in any

on retaining or paying legacies.

person or persons having or taking the burthen of the execution of the Will or other testamentary instrument, or the administration of the personal estate of any person deceased upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue (*n*), to which any other person or persons shall be entitled; and in case any person or persons, having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this Act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this Act, having received or deducted the duty so chargeable, then and in every of such cases, the duty which shall be due and payable upon every such legacy, and part of legacy, and residue,

If duty be not paid before legacies are retained by executors, or discharged, they having deducted it, the amount to be a debt from them to his Majesty; and if they pay legacies without deducting the duty, it shall be a debt from both parties.

way affect the liability of any person other than the person in whose favour it is expressed to be given." By 52 & 53 Vict. c. 7, s. 14, it is provided that no person shall under a testamentary document admitted to probate, or under letters of administration, or under a confirmation, be liable for payment of any Legacy or Succession duty, or duty imposed by the Act, after six years from the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true account. And trustees, executors and administrators, are not to be liable after six years if it be proved to the Commissioners that the account rendered was correct to the best of their knowledge. As to certificate of discharge in respect of Estate duty, see sect. 11 of the Finance Act, 1894, *ante*, p. 1743.

(*n*) See *Att.-Gen.* v. *Dardier*, 11 Q. B. D. 16, and sect. 22, *post*, p. 1780.

36 Geo. III. c. 52.

and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this Act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and in case any such person or persons, so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge (*o*), and of the person or persons to whom the same shall be made" (*p*).

What shall be deemed legacies within the intent of this Act.

Sect. 7. "That any gift by any Will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such Will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit (*q*), shall be deemed and taken to be a legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in

(*o*) The Succession Duty Act, 16 & 17 Vict. c. 51, contains no similar provision charging the executors, but makes the duty a charge on the interest of the successor: *Re Higgins*, 31 C. D. 142, see *post*, p. 1854, note (*l*).

(*p*) But where two legacies, though given in respect of the same portion of the testator's property, are distinct and separate, the legatee of the one legacy is not a debtor to the Crown, in respect of the duty on the other, nor has the Crown any lien on the subject of the one legacy in respect of duty on the subject of the other: *Att.-Gen.* v. *Giles*, 5 H. & N. 255.

(*q*) See *Re Cholmondeley*, 1 C. & M. 149, *post*, p. 1834; *Platt* v. *Routh*, 6 M. & W. 756, *post*, p. 1835; and stat. 8 & 9 Vict. c. 76, s. 4, *post*, p. 1834, note (*s*). See also *Re Thorley*, [1891] 2 Ch. 613; *Re White*, [1898] 2 Ch. 217, *post*, p. 1797, note (*y*).

a due execution of the Will or testamentary instrument by which the same shall be given: and every gift which shall have effect as a donation *mortis causâ* (*r*), shall also be deemed a legacy within the intent and meaning of this Act."

36 Geo. III. c. 52.

The value of annuities, and the duty, to be calculated according to the annexed tables, and the duty paid by instalments, &c.

Sect. 8. "That the value of any legacy given by way of annuity (*s*), whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed (*t*): And the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency: provided always, That if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease, but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a

(*r*) See *ante*, p. 590, as to donations *mortis causâ*.

(*s*) See *Crow* v. *Robinson*, 31 L. J. (N. S.) Ch. 516, as to what are annuities within this section.

(*t*) In the *Att.-Gen.* v. *Wynford*, 9 Exch. 746, a question arose on the construction of a Will, whether a legatee took an annuity for his own life only, or for the joint lives of himself and his wife, which was material, inasmuch as, by these tables, a larger amount of duty was payable in the former case. New tables are given in lieu of these, by the 31st section of the Act (16 & 17 Vict. c. 51), *post*, p. 1817. But it has been held that the new tables apply only to legacies given after the 19th May, 1853 (when the Act came in force): *Re Earl Cornwallis*, 11 Exch. 580.

36 Geo. III. c. 52.

return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured, which abatement the said commissioners for management of the Stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any moneys in their hands arising from the duties imposed by this Act."

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

Sect. 9. "That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or for other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payment shall become due; and the payment which shall be made for such duty shall be retained by the person or persons paying the same, out of the first four years' payment of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions."

Duty on legacies given to purchase annuities to be calculated on the sums necessary to purchase them.

Sect. 10. "That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied shall be discharged by payment of such duty so calculated as aforesaid, from all

other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable as hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased."

36 Geo. III. c. 52.

Sect. 11. "If any benefit shall be given by any Will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time, by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any Will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such Will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes or charged with answering the same."

Duty on legacies whose value can only be ascertained by application of the allotted fund to be charged on the money as applied (*u*).

Sect. 12. "The duty payable on a legacy or residue, or part of residue, of any personal estate given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue so given, as in the case of a legacy to one person; and where any legacy or residue, or part of residue shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary

How duty on legacies enjoyed by persons in succession, or having partial interests therein shall be charged:

(*u*) See *Re Wilkinson*, 1 Cr. M. & R. 142, *post*, p. 1844; *Att.-Gen.* v. *Fitzgerald*, 13 Sim. 83, *post*, p. 1844.

36 Geo. III. c. 52.

interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof (*x*), be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession" (*y*).

and by whom payable.

Sect. 13. "That the duty payable on any legacy or residue, or part of residue, so given to or so to be enjoyed by different

(*x*) The Legacy duty in such cases may now be commuted for a single payment under sect. 11 of 43 Vict. c. 14, and sect. 43 of 44 & 45 Vict. c. 12, which see, *post*, p. 1790, n. (*l*). See also *Lord Kenlis* v. *Hodgson*, [1895] 2 Ch. 458, as to meaning of the words "begin to enjoy the benefit thereof."

(*y*) See *Att.-Gen.* v. *Giles*, 5 H. & N. 255; *Macfarlane* v. *Lord Advocate*, [1894] A. C. 291. A testator bequeathed his residuary estate to his daughter for life, after which to her husband: On the testator's death 1*l.* per cent. duty was paid on her life interest, according to this section; afterwards her husband, having bequeathed his personal estate to her, predeceased her: His executors disclaimed the bequest to him in the original Will, and contended, consequently, that the residue of his wife's father's estate passed, as undisposed of, to her as his sole next of kin, and was chargeable, therefore, with only 1*l.* per cent. duty, and not 10*l.* per cent. (the rate payable by the husband): But it was held that the disclaimer was inoperative as to the duty: *Att.-Gen.* v. *Munby*, 3 H. & N. 826.

persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the Will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any trustee or trustees, or other person or persons to whom the same shall be payable, or paid in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case, all and every the person and persons having or taking the burthen of the execution of the Will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the Will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the Will or testamentary instrument, by which such partial interest shall have been created; and in all such cases, the

36 Geo. III. c. 52.

36 Geo. III. c. 52.

person or persons so chargeable with duty shall be debtors to the King's majesty, his heirs and successors, in like manner, and shall be subject to the like penalties as the person or persons having or taking the burthen of the execution of such Will or testamentary instrument are hereby made chargeable and subject to."

Plate, &c., while enjoyed in kind, not liable to duty till in possession of persons having power to dispose thereof.

Sect. 14. "Provided always, That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the Will or testamentary instrument by which such bequest shall have been made."

Duty on legacies enjoyed in succession to be charged as such, whether taken under Wills or by intestacy.

Sect. 15. "Provided always, That where any legacy, or any residue, or part of residue, shall be so given by any Will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such Will or testamentary instrument, and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy."

Duty on legacies in joint tenancy to be paid in proportion to the interests of the parties.

Sect. 16. "Where any legacy, or residue or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or

36 Geo. III. c. 52.

persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then and in such case all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only."

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

Sect. 17. "When any legacy or any residue, or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other person or persons, such bequest (unless chargeable as an annuity under the provisions herein contained) shall be charged with duty as an absolute bequest, to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy or residue, or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix, under the same title would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto, shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty."

How duty on legacies subject to power of appointment shall be charged (*z*):

Sect. 18. "Where any legacy, or the residue or any part of the residue, of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in

(*z*) See *Platt* v. *Routh*, 6 M. & W. 765, *post*, p. 1835; *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782, *post*, p. 1836.

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respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively, in and by the Will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof (*a*), and where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment."

and how on personal estates directed to be applied in purchase of real estates.

Sect. 19. "Any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate unless the same shall have been actually applied in the purchase of real estate before such duty accrued: but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless, That in case before the same or some part thereof shall be actually so applied, any

(*a*) The payment of this duty by the person executing such power does not satisfy the duty payable under the Succession Duty Act by the person who succeeds by virtue of the appointment: *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548.

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person or persons shall become entitled to an estate of inheritance in possession in the real estate (*b*) to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase" (*c*).

Estates *pur autre vie* applicable as personal estates, to be charged as such.

Sect. 20. "That estates *pur autre vie*, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate" (*d*).

Money left to pay duty not chargeable as a legacy (*e*).

Sect. 21. "Provided always, That if any direction shall be given, by any Will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty."

(*b*) These words must be taken to apply to a person who would become entitled, if real estate were purchased, to an estate of inheritance therein: *Macfarlane* v. *Lord Advocate*, [1894] A. C. 291.

(*c*) *De Lancey* v. *The Queen*, L. R. 6 Exch. 286; 7 Exch. 140. And see 16 & 17 Vict. c. 51, s. 30, *post*, p. 1817.

(*d*) See *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192, in which case a testator gave a rent-charge, to issue out of lands in England, to A. for life, and directed that after her death it should be continued, and equally divided between B., C., and D. during their lives and the life of the longest liver. B. died domiciled abroad, leaving an English Will, by which she disposed of her personal estate. On the death of A., who was survived by C. and D., the Crown claimed from B.'s executors Legacy duty in respect of B.'s third share of the rent-charge; and it was held that such duty was payable, for that the interest in the rent-charge which passed to B.'s executors was, by the Wills Act, "an estate *pur autre vie*, applicable by law in the same manner as personal estate," and therefore fell within 36 Geo. III. c. 52, s. 20, and that it was not exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person.

(*e*) As to what terms in a Will shall entitle a legatee to receive his legacy free of duty, see the cases collected *post*, pp. 1855 *et seq.*, and see also *ante*, p. 1740.

36 Geo. III. c. 52.
Mode of ascertaining duty on property not reduced into money.

Sect. 22. "In cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money (*f*), it shall be lawful for the person or persons having or taking the burthen of the administration of such effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the commissioners for management of the Stamp duties, to appoint a person to set such value, at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable without such appraisement, if the said commissioners shall think fit so to do; but if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon, on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but if the person or persons by whom such duty shall be payable shall not be satisfied with the valuation made under the authority of the said commissioners and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said commissioners to be reviewed by the commissioners of the land tax for the time being of the district or place where such effects shall be, at their next meeting, after the said commissioners for management of the Stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax, and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the said commissioners of Stamp duties; and the said commissioners of the land tax shall and may (if they think fit) appoint a person

(*f*) The provisions of this section apply to property which shall not be reduced into money during the course of the administration by the executor, and not merely to property which shall not have been reduced into money when the residuary account is brought in: *Att.-Gen.* v. *Dardier*, 11 Q. B. D. 16.

to appraise such effects, and set a value thereon, and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities, and their judgment shall be final; and if the valuation made under the authority of the said commissioners of the Stamp duties in the case last mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid shall exceed the duty offered to and refused by the said commissioners of Stamp duties, the expense of such appraisement and other proceedings in assessing such duties, shall be borne by the person or persons by whom such duty shall be payable; and if any dispute shall arise between any person or persons entitled to any such legacy, or residue, or part of residue, and any person or persons having or taking the burthen of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of Stamp duties on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said commissioners of the Stamp duties shall cause an appraisement to be made thereof at the expense of the person or persons by whom such duty ought to be paid, in the manner hereinbefore directed in other cases, and assess the duty thereon accordingly; and if such person or persons by whom such duty ought to be paid, shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation, by the said commissioners of the Stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land tax, upon appeal to them within the time, and under the restrictions, and in the manner hereinbefore directed in other cases; but if such valuation or assessment shall not be duly app aled from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then and in such case it shall be lawful to make the like application to such person as shall be deputed for that

36 Geo. III. c. 52.

36 Geo. III. c. 52.

purpose by the said commissioners to act in their stead, in such cases, within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects, in the same manner as the said commissioners are hereby authorized to act, subject nevertheless to the instructions and control of the said commissioners."

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

Sect. 23. "Where any legacy, or part of any legacy, or residue, or part of residue, whereon any duty shall be chargeable by this Act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration or compounded for less than the amount of value thereof, then and in such case the duty shall be charged and paid in respect of such legacy, or part of legacy, or residue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof or composition for the same: Provided always, That if any legacy, or bequest, shall be made in satisfaction of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty."

If legatees refuse to accept legacies, duty deducted, the Court, in case of suit, may order them to pay costs:

Sect. 24. "If any person or persons having or taking the burthen of the execution of the Will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or residue, or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as aforesaid, then and in such case, although no actual tender shall be made, if any suit shall be afterwards

instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the Court in which such suit shall be instituted, to order all costs, charges, and expenses attending the same, to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses, to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said Court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue, or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit, on payment of the money due, or delivering or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses, attending such suit, as shall be just."

36 Geo. III. c. 52.

and in suits where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the Court may make order therein.

Sect. 25. "If any suit shall be instituted concerning the administration of the personal estate of any person dying testate, or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue, or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed."

If suit be instituted concerning administration, the Court to provide for payment of the duty (*g*).

(*g*) See *Foster* v. *Ley*, 2 Bing. N. S. 1402, *post*, p. 1858; *Re Sammon*, 3 M. & W. 381, as to the pendency of a suit not relieving executor from the necessity of delivering an account. See also *Hicks* v. *Keat*, 3 Beav. 141. As to the obligation on solicitors not to let the Court make an order paying away a legacy without providing for the duty, see *Bryan* v. *Mansion*, 3 Jur. N. S. 475, *per* Lord Cranworth.

36 Geo. III. c. 52.
Executors may discharge legacies on payment of the duty accrued.

Sect. 26. "Provided always, That any person or persons having or taking the burthen of the execution of any Will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered."

No legacy liable to duty, to be paid without a receipt containing certain particulars;

Sect. 27. "No person or persons having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this Act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose Will, or testamentary disposition, or upon whose intestacy the title to such legacy or part of legacy, or to such residue or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy, or residue or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy, or part of legacy, or residue, or part of residue for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this Act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty

no receipt available unless duly stamped, &c.

hereby imposed shall first be given in evidence: Provided always, That a copy of the entry, in the books of the commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof: Provided also, That payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this Act, except the several payments which shall complete the payments for each of the first four years, during which such annuity shall be payable; and in like manner any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years in respect of which such legacy or bequest shall be chargeable with duty as an annuity."

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Copy of entry at stamp office of payment of duty, evidence.

Stamped receipts for annuities not required but on completing payments for each of the first four years.

Sect. 28. "That any person having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of the personal estate of any person deceased, and any trustee or trustees, or other person or persons hereby directed and required to account for any duty, who shall pay, deliver, or otherwise dispose of, or in any manner satisfy or discharge, or compound for any legacy given by such Will or testamentary instrument, or the residue, or any part of the residue, of such personal estate, to or for the benefit of any person or persons entitled to such legacy or any part thereof, or to such residue, or any part thereof, without taking such receipt or discharge in writing as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or the value of the property if not money, for which such receipt or discharge ought to have been given in pursuance of this Act: and all and every person and persons receiving or taking the benefit of any such money or other property without giving a written receipt or discharge for the same, in which the duty payable in respect thereof shall be expressed to have been allowed or paid to the person or persons to whom such receipt or discharge shall be given, and which shall bear date on the day of signing the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or on the value of the property, so received or taken."

Penalty of 10*l* per cent. for paying or receiving legacies without stamped receipts.

Sect. 29. "Every such receipt or discharge shall be brought

Receipts to be stamped

36 Geo. III. c. 52. within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c.

within the space of twenty-one days after the date thereof to the said head office of the said commissioners, or to some other office to be appointed by the said commissioners for such purpose, to be stamped, paying the duty for the same, and upon such payment, either at the said head office or at any other office to be appointed as aforesaid, the receiver-general or other proper officer to be appointed for that purpose by the said commissioners, as the case shall require, shall write upon such receipt or discharge an acknowledgment of the payment of the duty so paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and enter an account thereof in a book or books to be provided for that purpose, to the intent that he may be thereby charged with the sum so paid; and in case the duty shall be so paid at the said head office, then the receipt or discharge so brought to be stamped, shall be forthwith stamped with one of the said four stamps as the case shall require; and in case the duty shall be so paid at any other office to be appointed by the said commissioners as aforesaid, the receipt or discharge whereon such acknowledgment of the payment of duty shall be so written and subscribed, shall be transmitted within the space of twenty-one days from the day of payment of such duty to the said head office to be stamped, and the same shall be stamped accordingly with one of the said four stamps as the case shall require; and in case the person or persons paying such duty at any such office to be appointed as aforesaid, shall be desirous that the same should be transmitted to the said head office, by the officer to whom such duty shall be paid, and shall leave the same with such officer for such purpose, such officer shall thereupon sign and deliver an acknowledgment, that such receipt or discharge has been left with him for such purpose, and shall transmit such receipt or discharge to such head office to be stamped as aforesaid, and the same shall be sent again to such officer as soon as conveniently may be after the stamping thereof; and such officer shall deliver back the same to the person or persons entitled thereto, upon re-delivery to him of the acknowledgment which he shall have given for the same: Provided always, That if any such receipt or discharge shall not be so brought to any such office as aforesaid, within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt or discharge to the said head office to be stamped in like manner, within three calendar months after the

Receipts may be stamped within three months after date, on payment of duty, and 10*l.* per cent. penalty

date thereof, paying the duty for the same, and also the further sum of ten pounds *per centum* on such duty by way of penalty for not having before paid such duty, on payment of which duty and penalty, the said commissioners are hereby authorized and required to stamp such receipt or discharge, in the same manner as if the same had been brought to the said office within the space of twenty-one days from the date thereof; but the said commissioners, or any of their officers, shall not on any pretence whatever, except as hereinafter directed, stamp any vellum, parchment or paper, upon which any receipt or discharge for any legacy or part of legacy, or any residue of any personal estate, or any part thereof, shall be written or signed with the said new stamps, or any of them unless the duty for the same shall be paid, and such receipt or discharge shall be produced to be so stamped in manner aforesaid, within the times and in the manner hereinbefore respectively limited and appointed" (*h*).

36 Geo. III. c. 52.

but none to be stamped unless the duty be paid and they are brought to be stamped within the limited time.

Sect. 30. "If it shall appear to the satisfaction of the said commissioners of Stamp duties, upon oath or affirmation to be administered by a justice of the peace, or master or masters extraordinary in Chancery, which oath or affirmation such person or persons are hereby empowered to administer, that less duty has been paid for any legacy, or residue, or part of residue, than ought to have been paid for the same, by mistake, without any intention to defraud; and if application shall be made to the

Mistakes in paying duty may be rectified, if no suit be instituted, on payment of the difference within three months, and 10*l.* per cent.

(*h*) But now by stat. 48 Geo. III. c 149, s. 44, "in all cases not provided for by the preceding clause, where any receipt or discharge given for any legacy, or for the residue, or any share of the residue, of any personal estate, which shall have been given by Will or other testamentary instrument, or have devolved to any person or persons upon intestacy, shall be brought to the head office, to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty, which shall be payable in respect thereof, together with the penalty incurred, in consequence of the same not having been brought to be stamped, before the expiration of such three calendar months; and where any such receipt or discharge shall have been signed out of Great Britain, if the same shall be brought to be stamped, within twenty-one days after its being received in Great Britain it shall be lawful for the said commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof: anything contained in any former Act or Acts to the contrary notwithstanding."

48 Geo. III. c. 149, s. 44. Commissioners may stamp receipts for legacies, after three months from the date on payment of duty and penalty; and remit penalty (within twenty-one days), if signed out of Great Britain.

36 Geo. III. c. 52.

said commissioners to rectify such mistake, and accept the duty really due before any suit shall be instituted concerning the same, and within three calendar months after payment of the money actually paid instead of the just duty, it shall be lawful for the said commissioners to accept the difference between the money paid and the just duty, together with the sum of ten pounds *per centum* on such difference by way of penalty in full for the just duty, and which shall be in discharge of all penalties incurred by non-payment of such duty, and to cause an acknowledgment of the payment of the just duty to be written on the receipt or discharge given for such legacy or residue or part of residue, and to be subscribed by the proper officer, and also to cause such receipt or discharge to be properly stamped, if necessary, in the same manner as would have been done if the just duty had been originally paid."

Persons paying or receiving money contrary to this Act, indemnified on discovering the other offender:

Sect. 31. "Provided always, and be it further enacted, That the party or parties paying or satisfying any legacy, or any residue of any personal estate, or any part of such residue, or receiving the same, contrary to the provisions of this Act, who shall, within the space of twelve calendar months after the offence committed, discover the other party or parties offending therein, so that such party or parties so discovered be thereupon convicted, such person so discovering shall be indemnified and discharged from all penalties incurred for any offence against this Act."

If by infancy or absence legacies cannot be paid, the money may be paid into the Bank.

Sect. 32 provided that if by reason of the infancy, or absence beyond seas, of the legatees, legacies could not be properly paid, the money might be paid into the Bank of England (*i*).

Provisions in case such money be improperly paid in; provisions in case of payment of too much or too little duty.

The statute proceeds to provide, that if it shall afterwards appear that such money has been improperly paid into the Bank, the Court of Chancery, upon petition, in a summary way, may dispose thereof, in such manner as justice shall require: And if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, the person who shall have paid such duty may apply to the commissioners of Stamps to repay such excess; and if the duty paid appear to

(*i*) This section is repealed by the Trustee Act, 1893. See *ante*, p. 1139. The costs of paying the legacy into Court must come out of the estate, those of obtaining payment out must be borne by the legatee: *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drewr. 679. See also *post*, p. 1558.

be less than the duty which ought to have been paid, the person who paid such money, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, may apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said commissioners for such duty, out of the money in the Bank so paid in by such person, which payment the said Court is authorized to order.

36 Geo. III. c. 52.

Sect. 33. "If at the end of two years after the death of any person deceased, it shall appear to the satisfaction of the said commissioners of Stamp duties, that it will require time to collect the debts or effects of such person then outstanding, or that from circumstances it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of Stamp duties, to make application to the Court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the Court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty (*k*), stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said Court, and declaring at the same time upon oath, whether any other property of the deceased then outstanding, besides the property for which such composition shall be proposed to be made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such cases it shall be lawful for the said Court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty, which justly and equitably, under all circumstances, ought to be paid in respect of such personal estate so specified,

If it shall appear to the commissioners for Stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for:

(*k*) Cf. sect. 13 of the Finance Act, 1894, which gives the Commissioners of Inland Revenue certain powers to accept composition for *any* death duty; *ante*, p. 1744.

36 Geo. III. c. 52.

and thereupon it shall be lawful for the said commissioners, and they are hereby required, if the said Court of Exchequer to which such application shall be made, shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property, for which such composition shall be so paid, shall be discharged from any further payment of duty on the same: and in all future payments of such property, it shall be lawful for the persons having or taking the burthen of the execution of any Will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as hereinbefore directed: provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: Provided always nevertheless, That the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said Court of Exchequer shall allow and order such composition to be taken as aforesaid in the same manner as if no such composition had been made: and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions for charging such duty, as such person and persons respectively would be liable to if such composition had not been made" (*l*).

duty to be paid on any part of personal estates not included in the composition.

(*l*) By sect. 11 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), it is provided that: "Where any Legacy duty or Succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other

36 Geo. III. c. 52.
If any legacy be refunded, the duty to be repaid.

Sect. 34. "And be it further enacted, That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the

temporary interest in possession in a legacy or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest shall have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee, or other person who would be accountable for the duty in respect of such interest in expectancy, if it were then in possession, to commute the duty presumptively payable for a certain sum to be presently paid. For assessing the amount which shall be so payable the commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the commissioners in respect of duties paid in advance under the Succession Duty Act, 1853. Upon the receipt of the certain sum the commissioners shall give a discharge for the duty accordingly." And by sect. 43 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), it is provided that: "It shall be lawful for the Commissioners of Inland Revenue upon the application of the person acting in the execution of the Will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof Legacy duty is payable, together with the names or description of the class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for Legacy duty under such Will. If the commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given." See corresponding section in Finance Act, 1894 (sect. 12), *ante*, p. 1744, as to commutation of Estate duty in respect of interests in expectancy; and see also sect. 13 of the same Act (*ante*, p. 1744), giving power to accept composition for "death duties," which expression in that section includes Legacy and Succession duties.

36 Geo. III. c. 52.

said commissioners of Stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this Act imposed, or to allow the same in future payments as the case may permit or require" (*m*).

Executors previous to retaining their legacies to transmit the particulars with the duty offered, to the commissioners of Stamps, who shall charge the same agreeable to this Act.

Sect. 35. "Whenever any person or persons having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue, or any part of the residue, of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, or residue, or any part thereof: and every such person, before any such retainer shall transmit to the said commissioners of Stamp duties or their officers, a note containing the particulars of such legacy, residue, or part of residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon, and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this Act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said receiver-general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed therein: and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person or persons shall forfeit and pay treble the value of the duty which ought to have been paid."

Penalty for neglect of payment of duty for fourteen days.

If administration be

Sect. 37. "If the authority under or by colour of which any

(*m*) In case the commissioners decline to repay the duty, the proper remedy seems to be a petition of right under 23 Vict. c. 34.

36 Geo. III. c. 52.

made void, and any duty shall have been improperly paid, it shall be repaid, but if it ought to have been paid, it shall be allowed in account with the rightful executor.

person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former Acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said commissioners of Stamp duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners, out of any moneys in their hands arising from the duties imposed by this Act, or the said former Acts: but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case, the payment of such duty shall be valid and effectual, notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators: any law, usage, or custom, to the contrary notwithstanding" (*n*).

(*n*) By an instrument purporting to be the Will of S., deceased, the whole of S.'s personalty, amounting in the net to 12,748*l.* was bequeathed to I., a stranger in blood, who was executor: I. took out probate, and paid the duty of 10 per cent. on the whole net: Afterwards T., the next of kin to S., disputed the Will, on the ground that S. was not of disposing mind: I. paid 6,000*l.* to T., and consented that the Will should be revoked, and administration taken out by T., who in consideration thereof, released to I. her claim on the 12,748*l.*: T., from her nearness of blood, was liable to a duty of less than 10 per cent.: It was held that, under the enactments of this section, I. was entitled to a return of duty, not only on the 6,000*l.*, but also on the remaining 6,748*l.*, and that the duty on the whole 12,748*l.* was to be accounted for between T. and the Commissioners of Stamps, as duty charged on T., at the lower rate: *Reg.* v. *Commrs. of Stamps*, 6 Q. B. 657.

31 & 32 Vict. c. 124, s. 9. Arrears of legacy duty or succession duty to be paid with interest.

By 31 & 32 Vict. c. 124, s. 9, it is provided, "that in any case in which duty payable in respect of any legacy or residue under the Legacy Duty Acts in force, or in respect of any succession under the Succession Duty Act, 1853, shall be in arrear, the person by whom the arrears of duty may be payable shall be liable to pay interest thereon [at 4*l.* per cent. per annum; and such interest shall be recoverable by the Commissioners of Inland Revenue in the same manner as the arrears of duty, and as part thereof] (*o*); provided that the acceptance or recovery by the said commissioners of arrears of duty, with interest thereon as aforesaid, shall be an absolute waiver of the penalties (if any) which may have been incurred under the Legacy or Succession Duty Acts."

44 Geo. III. c. 98.

The stat. 44 Geo. III. c. 98, after reciting that the several duties therein mentioned are become very numerous, intricate and complicated, and it will naturally contribute to the public benefit to consolidate and simplify the same, enacts, "That from and after the 10th of October, 1804, all and singular the duties, &c. (aforesaid) shall cease and determine," and imposes the several duties contained in the schedule in lieu thereof.

45 Geo. III. c. 28.

Legacies, &c., out of real estate subject to duties (*p*).

Legacies charged upon or payable out of the produce of real estate were not subject to the payment of duty until the 45 Geo. III. c. 28: By that statute duties are imposed "Upon all legacies specific or pecuniary, or of any other description, whether the same be charged upon or payable out of *any real* or personal *estate*, and upon all residues or shares of personal estate left by any Will or testamentary instrument, or divided by force of the Statute of Distributions, or the custom of any province or place, and upon moneys, or residues, or shares of moneys *arising from the sale of real estates*, by any Will or testamentary instrument directed to be sold." And by sect. 4 it was enacted, "That every gift by any Will or testamentary instrument of any person dying after the passing of this Act, which, by virtue of any

What shall be deemed a legacy under this Act (*q*).

(*o*) The words in brackets were repealed by sect. 49 of the Finance Act, 1896. By sect. 18 of the same Act, simple interest at the rate of 3 per cent. per annum, without deduction for income tax, is now payable. This provision as to interest is made applicable by sub-sect. (2) to all death duties as defined by sect. 13. See *ante*, p. 1735, where sect. 18 is set out *verbatim*, and p. 1744, where sect. 13 of the Finance Act is set out.

(*p*) See also stat. 8 & 9 Vict. c. 76, s. 4, *post*, pp. 1796—1798.

(*q*) Sect. 4 was repealed by Stat. Law Rev. Act, 1872. The definition was extended by stat. 8 & 9 Vict.

such Will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate (*r*), or be directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this Act granted any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any Will or testamentary instrument under any power given for that purpose by any such marriage settlement or deed or deeds."

45 Geo. III. c. 28.

Acts shall not extend to appointments by Will under settlements, &c.

Sect. 5. "The duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such moneys, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons (*s*) entitled to such real estate, subject to any such legacy; or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained (*t*) by the person paying or satisfying any such

Duties on legacies charged on real estates shall be paid by the trustees, or the persons entitled to such estate, and retained as under 36 Geo. III. c. 52.

c. 76, s. 4, *post*, pp. 1796—1798. But now by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2), as to any person dying on or after 1st July, 1888, it is provided that legacies payable out of or charged upon real estate, or the proceeds thereof, shall not be chargeable with Legacy duty but with Succession duty. See *post*, pp. 1816 and 1839.

(*r*) See *Att.-Gen.* v. *Pickard*, 3 M. & W. 552, *post*, p. 1837; *Att.-Gen.* v. *Lord Hertford*, 14 M. & W. 284, *post*, p. 1838.

(*s*) See *Att.-Gen.* v. *Jackson*, 2 C. & J. 101, *post*, pp. 1849, 1850.

(*t*) See *Hales* v. *Freeman*, 1 Brod. & Bing. 291, *post*, p. 1854.

45 Geo. III. c. 28.

legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an Act passed in the thirty-sixth year of the reign of his present Majesty, intituled, *An Act for repealing certain duties on legacies and shares of personal estates, and for granting other duties thereon in certain cases.*"

48 Geo. III. c. 149.

The statute 48 Geo. III. c. 149, repealing the duties granted by the last Act (except arrears, which are to be recoverable by the same ways and means, &c., in all respects, as if this Act had not been made), enacts, by sect. 2, "That from and after the 10th of October, 1808, there shall be raised, levied, and paid," the several duties specified in the schedule; in which schedule, part 3, is contained the following:—"For every legacy, &c., given by any Will or testamentary instrument of any person who died before or upon the 5th of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th of October, 1808," the several duties, after the rates therein specified. And "for every legacy, &c., &c., of any person who shall have died after the 5th of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any moneys to arise by the sale, mortgage or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 10th day of October, 1808," the several other duties thereafter specified.

This statute was succeeded by the Stamp Act, 55 Geo. III. c. 184, which repealed the last-mentioned duties, with the same exception of arrears, and imposed the new duties above specified at large (*u*).

What gifts are to be deemed legacies.

A fuller and more explicit definition of a legacy is contained in the later statute of 8 & 9 Vict. c. 76, s. 4 (*x*), by which, after reciting that "under or by virtue of the said several recited Acts (55 Geo. III. c. 184, 5 & 6 Vict. c. 82, 8 & 9 Vict. c. 2), certain duties have been granted and are now payable in Great Britain and Ireland respectively upon legacies,

(*u*) *Ante*, p. 1763. (*x*) See *post*, p. 1838.

8 & 9 Vict. c. 76, s. 4.

and doubts have been entertained whether certain gifts by Will or testamentary instrument are legacies liable to the said duties, and it is expedient to remove such doubts," it is enacted, "that from and after the passing of this Act, every gift (*y*) by any Will or testamentary instrument of any person, which by virtue of any such Will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of (*z*), or which gift is or shall be payable, or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof (*a*) which such person hath had or shall have had any right or power to charge, burden or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causâ* shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly (*b*). Provided always, that no

(*y*) The fact that services have to be rendered in return does not prevent the sum given from being a legacy of the full amount specified and liable to duty on that full amount: *Re Thorley*, [1891] 2 Ch. 613. A clause in a Will declaring that a professional trustee shall be entitled to charge for work done is in effect a legacy: *Re White*, [1898] 2 Ch. 217.

(*z*) *Lord Adv.* v. *Bogie*, [1894] A. C. 83, and *Att.-Gen.* v. *Loyd*, [1895] 1 Q. B. 496.

(*a*) But now by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2), as to any person dying on or after 1st July, 1888, it is provided that legacies payable out of or charged upon real estate or the proceeds thereof shall not be chargeable with Legacy duty but with Succession duty: *Ante*, p. 1764, note (*c*).

(*b*) It will be seen by reference to the Finance Act, 1894, s. 2 (c), and s. 38 (2) of 44 Vict. c. 12 (*ante*, p. 1706), that the accounts, in reference to which the duties on accounts are imposed, have to include property taken as a *donatio mortis causâ*: the result is that there are payable in respect of such property both Legacy duty and Estate duty. And thus property the subject of a *donatio mortis causâ*, which, as appears in an earlier portion of this Work, partakes partly of the nature of a legacy and partly of the nature of a gift *inter vivos*, is treated for

8 & 9 Vict. c. 76, s. 4.

sum of money, which by any marriage settlement is or shall be subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties or legacies under the Will in which such sum is or shall be appointed or apportioned in exercise of such limited power."

SECTION II.

The Succession Duty Act, 1853.

16 & 17 Vict. c. 51 (Succession Duty Act).

By stat. 16 & 17 Vict. c. 51 (An Act for granting to her Majesty Duties on Succession to Property, and for altering certain Provisions of the Acts charging Duties on Legacies and Shares of Personal Estates), it is enacted, by sect. 1, that "in the construction and for the purposes of this Act,

Interpretation of certain terms in this Act:

The term 'Real Property' shall include all freehold, copyhold, customary, leasehold, and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments:

The term 'Personal Property' shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property (*c*).

the purpose of taxation as part of the estate of the testator or intestate. Sect. 38 also enlarges the property so to be treated by including in the account of the deceased's estate certain gifts and successions *inter vivos*, but it does not, nor does any other legislation render such gifts and successions liable to Legacy duty. The operation of sect. 38 has been somewhat extended by sect. 11 of 52 Vict. c. 7, which amplifies the definitions in sub-sect. 2 of sect. 38, and practically repeals the provisions in sub-sect. 3 for return of duty. These sections are set out *ante*, pp. 1706, 1707.

(*c*) Succession duty is not payable on legacies given by the Will of a person domiciled in a foreign country: *Wallace* v. *Att.-Gen.*, L. R. 1 Ch. 1. See *post*, p. 1846 *et seq.*; but property to which there is succession under an English settlement vested in British trustees, whether the settlement be made by an alien or a British

The term 'Property' alone shall include real property and personal property: 16 & 17 Vict. c. 51.

The term 'Succession' shall denote any property chargeable with duty under this Act (*d*):

The term 'Trustee' shall include an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust:

The term 'Person' shall include a body corporate, company, and society:

The term 'Legacy Duty Acts' shall denote the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons."

subject, and whether the settlement be made by deed or Will, and wherever the property is locally situate, is liable to Succession duty: *Att.-Gen.* v. *Campbell*, L. R. 5 H. L. 524; *Lyall* v. *Lyall*, L. R. 15 Eq. 1; *Att.-Gen.* v. *Jewish Colonization Association*, [1900] 2 Q. B. 556; [1901] 1 Q. B. 123. See also *ante*, p. 1713, and *post*, p. 1852, where these cases are considered. And it must be remembered that although according to the decision in *Wallace* v. *Att.-Gen.*, *ubi supra*, Succession duty is not payable on legacies given by the Will of a person domiciled in a foreign country, yet where a testator with a foreign domicil by his Will directs an investment in England in trust, and such investment is made, Succession duty will be payable in respect of the succession under the trust: *Re Badart's Trusts*, L. R. 10 Eq. 288; *Lyall* v. *Lyall*, *ubi supra*; but unless the funds have come to the hands of the English trustees at the time of the death of the person on whose death Succession duty is claimed, no duty will be payable: *Lyall* v. *Lyall*, *ubi supra*. The word "property" includes foreign moveable property, as, for instance, funds or shares of a foreign government or corporation comprised in a British settlement, vested in trustees, subject to British jurisdiction, and recoverable by action in a British Court; the mere fact of the person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from Succession duty: *Re Cigala's Settlement*, 7 C. D. 351. A covenant to pay money upon death, accompanied with a disposition of the fund covenanted to be paid, is a disposition of property within sect. 2. See *Att.-Gen.* v. *Montefiore*, 21 Q. B. D. 461; *Lord Advocate* v. *Roberts' Trustees*, 21 Sc. Sess. Cas. 2nd ser. 449; *Re Micklethwaite*, 11 Ex. 452. And compare *Re Higgins*, 31 C. D. 142.

(*d*) As to the effect of sub-sect. 4 of sect. 6 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), incorporating into sub-sect. 1 of that Act the definition of the term "succession" contained in this section, see the case of *Att.-Gen.* v. *Aberdare*, [1892] 2 Q. B. 684, *post*, p. 1829, note (*q*). As to meaning of the expression "settlement" under the Finance Act, 1894, see *ante*, p. 1718.

16 & 17 Vict. c. 51. What disposition and devolutions of property shall confer successions:

Sect. 2. "Every past or future disposition of property, by reason (*e*) whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently (*f*), and either originally or by way of substitutive limitation and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'Succession' (*g*); and the term 'Successor' shall denote the person so entitled; and the term 'Predecessor' (*h*) shall

definitions of the terms "successor," "predecessor."

(*e*) As to the construction of these words, see *Wilcox* v. *Smith*, 4 Drewr. 40.

(*f*) As to what person may properly be said to be contingently entitled after an interval, see *Att.-Gen.* v. *Gell*, 3 Hurl. & C. 615.

(*g*) As to what shall constitute a succession, see *Att.-Gen.* v. *Yelverton*, 7 H. & N. 306; *Att.-Gen.* v. *Gardner*, 1 Hurl. & C. 639; *Ring* v. *Jarman*, L. R. 14 Eq. 357; *Att.-Gen.* v. *Robertson*, [1892] 2 Q. B. 694; [1893] 1 Q. B. 293; *Att.-Gen.* v. *Earl of Selborne*, [1902] 1 K. B. 388. A conveyance or assignment by way of *bonâ fide* sale does not create a succession within the meaning of this Act: *Fryer* v. *Morland*, 3 C. D. 675; *Wolverton* v. *Att.-Gen.*, [1898] A. C. 535. And compare *De Rechberg* v. *Beton*, 38 C. D. 192.

(*h*) As to what constitutes a predecessor, see *Re De Lancey*, L. R. 4 Ex. 345; *Att.-Gen.* v. *Cecil*, L. R. 5 Ex. 263; *Att.-Gen.* v. *Littledale*, L. R. 5 Ex. 275; L. R. 5 H. L. 290. With regard to real property where the succession is by disposition, the predecessor is the settlor; and where by devolution, the predecessor is the person last in possession: *Lord Saltoun* v. *Lord Advocate*, 3 Macq. H. of L. 673. Where a power is created to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or succession is to be derived, is within sect. 2 the predecessor of the person taking such benefit or succession: *Charlton* v. *Att.-Gen.*, 4 A. C. 427. See also *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150; *Att.-Gen.* v. *Floyer*, *ibid.* 477; *Att.-Gen.* v. *Smythe*, *ibid.* 497; *Wolverton* v. *Att.-Gen.*, [1898] A. C. 535. See also *Att.-Gen.* v. *Sibthorp*, 3 H. & N. 424. And cf. sect. 22 (2) (b) of the Finance Act, 1894, *ante*, p. 1757. Where a power of jointuring was given by a private Act to the owner of the statutory entail for the time being, it was held that with respect to each jointure the predecessor or person from whom the interest of the jointress is derived is her own husband, and that no Succession duty is payable: *Re Bolton Estates Act, 1863*, [1904] 2 Ch. 286. In the case of an appointment by a donee of a general power which falls within sect. 2, and does not fall within sect. 4, the appointees must be held to derive their interest from the donor of the power as predecessor and not from the

denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived" (*i*). 16 & 17 Vict. c. 51.

Joint tenants taking by survivorship to be deemed successors.

Sect. 3. "Where any person shall, at or after the time appointed for the commencement of this Act, have any property vested in them jointly, by any title not conferring on them a succession, any beneficial interest in such property accruing to any of them by survivorship shall be deemed to be a succession; and every person to whom any such interest shall accrue shall be deemed to be the successor; and the person upon whose death such accruer shall take place shall be deemed to be the

donee, and this, whether the power be joint or sole: *Re Barker*, 7 H. & N. 109; *Charlton* v. *Att.-Gen.*, 4 A. C. 427; *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548. It has been perfectly well settled since the case of the *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150, that where there is a family arrangement for a resettlement of an estate, by which the tenant for life takes back his life estate and the powers which he had before, then everything else under the settlement must necessarily come out of the rest of the estate which belonged to the tenant in tail, and therefore the succession must be derived from the tenant in tail: *Att.-Gen.* v. *Dowling*, 6 Q. B. D. 179, *per* Lord Selborne. It is different if the power of appointment in respect of the estate is granted for value given, for then the donee of the power may be the predecessor, although he is not the owner of the estate: *Att.-Gen.* v. *Baker*, 4 H. & N. 19; *Re Jenkinson*, 24 Beav. 64; *Att.-Gen.* v. *Dowling*, 6 Q. B. D. 177. See also *Att.-Gen.* v. *Yelverton*, 7 H. & N. 306: but a tenant for life will not be considered the predecessor unless at the time of the settlement he had or claimed to have an interest in the estate subject to the power, or was a creditor on the estate: *Att.-Gen.* v. *Floyer*, 9 H. L. C. 477. Marriage is not a disposition for valuable consideration so as to make the donee of the power a purchaser: *Re Ramsay's Settlement*, 30 Beav. 75. Further, it should be noted that the case of a family settlement is not within the first branch of sect. 4; for the first branch of that section points to an absolute power, practically equivalent to property. A general power in a family settlement which cannot be exercised without the concurrence of two minds is not equivalent to a joint property in the two donees: *per* Lord Selborne in *Charlton* v. *Att.-Gen.*, 4 A. C. 427. The words of sect. 4 apply to the case of one person possessing a general power to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son, where one is intended to be a check upon the other in the exercise of the power: *per* Lord Cairns, L. C., *ibid.* As to voluntary nomination under the Customs Annuity and Benevolent Fund in rendering the fund liable to Succession duty, see *Att.-Gen.* v. *Abdy*, 1 H. & C. 296: *aliter* as to a nomination to secure an advance.

(*i*) The general plan of the Act is expounded by Lord Justice Turner in *Oldfield* v. *Preston*, 3 De G. F. & J. 416. See also *Fryer* v. *Morland*, 3 C. D. 675.

16 & 17 Vict. c. 51.

predecessor; and where any persons after the time appointed for the commencement of this Act shall take any succession jointly, they shall pay the duty, if any, chargeable thereon by this Act in proportion to their respective interests in the succession; and any beneficial interest in such succession accruing to any of them by survivorship shall be deemed to be a new succession, derived from the predecessor from whom the joint title shall have been derived" (*k*).

General powers of appointment to confer successions.

Sect. 4. "Where any person shall have a general power of appointment under any disposition of property taking effect (*l*) upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor" (*m*).

(*k*) It was formerly said that in respect of property which had come to a husband and wife jointly there could be no succession by survival to the survivor, because the tenancy was by entireties; whether the effect of the Married Women's Property Act, 1882, has been to alter this, has not been expressly decided. It seems, however, to be clear that, since the Act, a gift to a husband and wife jointly will produce the same effect as a gift to two persons between whom the marriage relation does not exist: Lush, Husband and Wife, 2nd edit. p. 132. See also *Thornley* v. *Thornley*, [1893] 2 Ch. 229. As to the effect generally of the Act on property coming to a husband and wife jointly, see *Re March*, 27 C. D. 166; *Re Jupp*, 39 C. D. 148; *Re Dixon*, 42 C. D. 306; *ante*, pp. 861, 1206, note (*m*); and cf. sect. 2 (1) (b) of the Finance Act, 1894, *ante*, pp. 1698, 1703.

(*l*) The words "taking effect" refer to the "power," and not to the "disposition," and therefore where a power came into operation before the commencement of the Act, it was held that sect. 4 did not apply, although the appointment did not take effect till after the commencement of the Act: *Re Lovelace*, 4 De G. & J. 340; 28 L. J. Ch. 489; *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548.

(*m*) This section does not restrict the operation of the duty as regards appointments to cases where the powers are created by Wills taking effect, or by settlements made, after the commencement of the Act: *Re Lovelace*, 4 De G. & J. 340. The rule settled by this case, together with *Re Wallop's Case*, 1 De G. J. & S. 656, is that (in

Sect. 5. "Where any property shall, at or after the time appointed for the commencement of this Act, be subject to any charge, estate or interest determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate or interest, shall be deemed to be a succession accruing to the person, or the persons if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title to the property so charged shall be deemed to be the predecessor or predecessors, as the case may be" (*n*).

16 & 17 Vict. c. 51. Extinction of determinable charges to confer successions.

cases where sect. 4 applies,) where a general power is given and exercised, the appointee is a person taking in succession to the appointor, and the appointor is also a successor to the donor of the power: *Re Chapman's Trusts*, 2 H. & M. 450, *per* Wood, V.-C.; *Att.-Gen.* v. *Upton*, L. R. 1 Ex. 224. But *contrà*, if sect. 2 and not sect. 4 applies: *Re Barker*, 7 H. & N. 109, where it appears to have been held that the appointee was liable as on a succession derived from the donor of the power. Where A., having a general power of appointment, subject to a life interest in his sister B., appointed by Will to C. for life, with remainder to such persons as B. should appoint; and A. died, and then B. died in C.'s lifetime, having appointed to strangers; and then C. died; it was held that B.'s appointees were liable to 10*l.* per cent. Legacy duty, but that the fund was not liable to Succession duty in respect of the succession to A., by reason of the exemption in the 14th section, having regard to the principle indicated by the 16th section: *Re Chapman's Trusts*, 2 H. & M. 447. As to what is a general power within the meaning of this section, see *Charlton* v. *Att.-Gen.*, *ante*, p. 1800, note (*h*).

(*n*) Sect. 5 relates to property subject to some charge, estate or interest, determinable on death, and enacts in substance that the increase of benefit accruing on the determination of such charge, estate or interest, to the person beneficially entitled to the property subject thereto, shall be a succession — that is to say, the section provides for the case of a person having property relieved from a burden by the death of another. It does not therefore apply in a case where property is limited to pass beneficially, alternatively on the lapse of a time certain or on a death, whichever shall first occur, so as to entitle the person to whom the property passes, in the event of the death first occurring, to pay duty only on the value of the estate between the death and the end of the time limited, as being "the increase of benefit" accruing by reason of the death, but he must pay duty on the whole value of the estate accruing, as being a succession within sect. 2: *Att.-Gen.*

16 & 17 Vict. c. 51.
Persons now beneficially entitled to real property subject to leases for life, not liable to duty.

Sect. 6. "Provided, that no person entitled, at the time appointed for the commencement of this Act, to the immediate reversion in any real property expectant upon the determination of any lease for life or for years determinable on life, shall be chargeable with duty in respect of such determination, in the event of the same occurring in his lifetime."

Dispositions accompanied by the reservation of a benefit to the grantor, &c., to confer successions.

Sect. 7. "Where any disposition of property, not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made."

Dispositions to take effect at periods depending on death, or made for evading duty, to confer successions.

Sect. 8. "Where any disposition of property shall be made to take effect at a period ascertainable only by reference to the date of the death of any person dying after the time appointed for the commencement of this Act, such disposition shall be deemed to confer a succession on the person in whose favour the same shall be made; and where any disposition of property shall purport to take effect presently or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a Court of Law or Equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death, then such last-mentioned person shall be deemed to acquire the property so passing as a succession derived from the person making the disposition as the predecessor; and where any Court of competent jurisdiction shall declare any disposition to have been fraudulent and made for the purpose of evading the duty

v. *Noyes*, 8 Q. B. D. 125. The determination of a dower or jointure by death will confer a succession on the person entitled to the estate relieved: *Harding* v. *Harding*, 2 Giff. 597. See as to the expression "an interest ceasing on the death of the deceased," in sect. 2 of the Finance Act, 1894, *ante*, p. 1698. Sect. 2 (1) (b) of that Act would seem to have been adapted from sect. 5 of the Succession Duty Act.

imposed by this Act, it shall be lawful for such Court to declare a succession to have been conferred on such person at such time and to such an extent as such Court shall think just; and such last-mentioned person shall be deemed to have taken a succession accordingly derived from the person making such disposition as predecessor."

16 & 17 Vict. c. 51.

Sect. 9. "The duties hereinafter imposed shall be considered as Stamp duties, and shall be under the care and management of the Commissioners of Inland Revenue, hereinafter called 'The Commissioners,' who, by themselves and their officers, shall have the same powers and authorities for the collection, recovery and management thereof, as are by an Act passed in the session holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter one, or by any other Act or Acts, vested in them for the collection, recovery and management of any Stamp duties; and shall provide proper stamps for denoting the rate *per centum* of the duties payable under this Act; and shall have all other powers and authorities requisite for carrying this Act into execution."

Duties to be under the care and management of the Commissioners of Inland Revenue.

Sect. 10. "There shall be levied and paid to her Majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties (*o*) (that is to say,)

Duties on successions.

Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of 1*l.* *per centum* upon such value (*p*):

(*o*) By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (1), it is provided that the following additional duties, besides those chargeable by this section, shall be charged on successions on deaths occurring on or after July 1st, 1888, viz., where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of 10*s.* per cent. upon the value of the interest of the successor; in all other cases a duty of 30*s.* on that interest; but this additional duty is not to be payable on leaseholds passing by Will or devolution of law, or on property included in an account according to the value whereof duty is payable under 44 & 45 Vict. c. 12. In respect of property chargeable with Estate duty under the Finance Act, 1894, the additional succession duties imposed by sect. 21 of the Act of 1888 shall not be levied. See sect. 1 of the Finance Act, 1894, *ante*, pp. 1698, 1762.

(*p*) By sect. 41 of 44 Vict. c. 12, it is provided that: "In respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of 1*l.* per cent. imposed by the Succession Duty Act, 1853, shall not be payable." The ex-

16 & 17 Vict. c. 51.

Where the successor shall be a brother or sister, or a descendant of a brother or sister of the predecessor, a duty at the rate of 3*l.* *per centum* upon such value:

Where the successor shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the predecessor, a duty at the rate of 5*l.* *per centum* upon such value:

Where the successor shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, a duty at the rate of 6*l.* *per centum* upon such value:

Where the successor shall be in any other degree of collateral consanguinity to the predecessor than is hereinbefore described, or shall be a stranger in blood to him, a duty at the rate of 10*l.* *per centum* upon such value" (*q*).

emption in sect. 41 applies not only to duties payable in connection with the Will or intestacy which gives rise to the claim for Stamp duty, but to duties in connection with some other Will or intestacy or some prior disposition creating a succession; that is to say, its application is not limited to cases where the Succession duty which would have been claimable but for the section and the duty the payment of which, under stat. 55 Geo. III. c. 184, is the basis of the exemption, are payable in respect of the same administration: *Re Haggarth's Trusts*, 22 C. D. 545; and cf. *Lord Kenlis* v. *Hodgson*, [1895] 2 Ch. 458, *ante*, p. 1774, as to Legacy duty, and where the duty claimed was not under the same Will as that under which the Affidavit duty had already been paid. Under sect. 1 of the Finance Act, 1894, the duty mentioned in para. 5 of the First Schedule to that Act shall not be levied in respect of property chargeable with Estate duty, that is to say, "The duty at the rate of 1*l.* per cent., which would, by virtue of the Acts in force relating to Legacy duty or Succession duty, have been payable under the Will or intestacy of the deceased, or under his disposition, or any devolution from him, under which respectively Estate duty has been paid, or under any other disposition under which Estate duty has been paid."

(*q*) Although the *status* of legitimacy will be determined according to the law of the domicil of the parents: *Re Goodman's Trusts*, 17 C. D. 266; *Skottowe* v. *Young*, L. R. 11 Eq. 474; yet the mere fact that illegitimate children acknowledged by the parent may by the law of the domicil be entitled to take his property, will not prevent them being treated as strangers in blood to their putative father for the purposes of this section, unless the law of domicil also legitimates them: *Atkinson* v. *Anderson*, 21 C. D. 100.

16 & 17 Vict. c. 51.

Provision as to married persons chargeable with succession or legacy duties.

Sect. 11. "Where any person chargeable with duty under this Act in respect of any succession, or chargeable with duty under the Legacy Duty Acts in respect of any legacy bequeathed to him or her by a testator dying after the time appointed for the commencement of this Act, or in respect of the personal estate of any person dying after the same period, shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, testator or deceased person, then the person taking such succession, legacy or personal estate, shall pay in respect thereof the same rate of duty only as such his or her wife or husband would have been chargeable with if she or he had taken the same."

What duties payable when the successor is also the predecessor.

Sect. 12. "Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this Act" (*r*).

Provision as to joint predecessors.

Sect. 13. "Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the commissioners to agree with the successor as to the duty payable; but if no such agreement shall be made, the

(*r*) See as to the construction of this section, *Att.-Gen.* v. *Sibthorp*, 3 H. & N. 424; *Att.-Gen.* v. *Braybrooke*, 5 H. & N. 488; *S. C.*, *sub nom. Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 450; *Att.-Gen.* v. *Gardner*, 1 H. & C. 639; *Att.-Gen.* v. *Cecil*, L. R. 5 Ex. 263. And cf. with this section the provisions of sects. 14 and 15 of the Finance Act, 1896, which have the effect of exempting from Estate duty the mere enlargement of a settlor's interest, and the reverter of property to the disponer, *ante*, pp. 1704, 1705.

16 & 17 Vict. c. 51.

successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly" (*s*).

Duty on transmitted successions.

Sect. 14. "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them" (*t*).

Duties payable in respect of transferred interests.

Sect. 15. "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person,

(*s*) As to the construction of this section, see *Att.-Gen.* v. *Baker*, 4 H. & N. 19.

(*t*) See *Re Chapman's Trusts*, 2 H. & M. 447; *Att.-Gen.* v. *Cleave*, 31 L. T. N. S. 86. Where an interest in personal property has been transmitted before it has ripened into enjoyment, it matters not whether the person originally entitled died before or after the commencement of the Act, only one duty is payable on any succession to such property, whether such duty be Legacy or Succession duty. If the duty is Succession duty and the interest has passed through more than one successor, then under this section the duty payable shall be the highest that would have been paid by any of such successors. If the duty be Legacy duty, then under sect. 18 no Succession duty of any kind is payable; *Att.-Gen.* v. *Littledale*, L. R. 5 Ex. 275; L. R. 5 H. L. 290. See also observations of Lord Herschell on the view of this section taken by Jessel, M. R., in *Re Cooper and Allen's Contract*, 4 C. D. 802; *Wolveston* v. *Att.-Gen.*, [1898] A. C. 535, 552.

then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place" (*u*). 16 & 17 Vict. c. 51.

(*u*) As to the construction of this section, see *Att.-Gen.* v. *Gardner*, 1 Hurl. & C. 639; *Att.-Gen.* v. *Rushton*, 2 Hurl. & C. 812; *Att.-Gen.* v. *Cecil*, L. R. 5 Ex. 263; *Att.-Gen.* v. *Littledale*, L. R. 5 Ex. 275; L. R. 5 H. L. 290. See as to what constitutes "alienation" within this section, *per* Lord Herschell in *Wolverton* v. *Att.-Gen.*, [1898] A. C. 535, 554. Where a succession is alienated, and falls into possession after the death of the alienor, duty is payable under this section at the same rate as if no alienation had been made, and the alienor had survived the falling into possession: *Sol.-Gen.* v. *Law Reversionary Interest Society*, L. R. 8 Ex. 233; *Att.-Gen.* v. *Duke of Northumberland*, [1904] 1 K. B. 762. In the latter case the tenant for life of real estate and the tenant in tail in remainder joined in the execution of a disentailing deed, by which the property stood limited to such uses as they should by deed jointly appoint. They then jointly appointed and conveyed part of the land to a purchaser, who devised it to his wife, who devised it to her daughter, who paid Succession duty on her mother's death. The tenant for life subsequently died, and it was held by the Court of Appeal (overruling in this respect *Re Cooper and Allen's Contract*, 4 C. D. 802) that Succession duty was payable in respect of the succession of the tenant in tail, notwithstanding the alienation of the succession and the disposition of the property by the alienee. Sums advanced to children under a power out of funds settled by marriage settlement on the usual trusts are liable to Succession duty as a succession the title to which has been accelerated within the meaning of this section: *Ex parte Sitwell*, 21 Q. B. D. 466. But where a tenant for life and remainderman join in disentailing and resettling a property, and limiting an annuity immediately to the remainderman during the joint lives of himself and the tenant for life, that is not an acceleration of interest within this section: *Inland Revenue Commrs.* v. *Harrison*, L. R. 7 H. L. 1. So, where a father made a settlement on the marriage of his son, and conveyed an estate to trustees to such uses as the father and son should jointly appoint, and in default of and until such appointment to the use of the father for life, and after his decease to the son in fee simple in case he should survive his father, but if he died in his father's lifetime leaving a son who should attain twenty-one, to the use of that son, and if there were no such son to the father in fee simple, and the father and son subsequently jointly appointed the estate to the son in fee simple, it was held by the Court of Appeal that the son took the estate by a

16 & 17 Vict. c. 51. Succession subject to trusts for charitable or public purposes chargeable with duty.

Sect. 16. "Where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favour of an individual, would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of 10*l.* per centum upon the amount or principal value of such property; and it shall be lawful for the trustee of any such property to raise the amount of any duty due in respect thereof, with all reasonable expenses, upon the security of the charity property, at interest, with power for him to give effectual discharges for the money so raised" (*x*).

Provisions for life policies and certain *post obit* bonds.

Sect. 17. "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession" (*y*).

new title under the appointment, and not by a succession the title to which had been accelerated by the surrender or extinction of any prior interest within the meaning of sect. 15, and that Succession duty was not payable: *Att.-Gen.* v. *Earl of Selborne*, [1902] 1 K. B. 388. The successor from whom duty is payable is the person who on the happening of the death eventually becomes beneficially entitled in possession; that which was conferred upon any previous successor was only an expectant interest, not a succession. The interest of an executor, not being beneficial, is not a succession within sect. 2 or within sect. 15; for sect. 15 imposes no new duty, only a duty in substitution for that imposed by sect. 2: *Att.-Gen.* v. *Littledale*, L. R. 5 Ex. 275; L. R. 5 H. L. 290.

(*x*) *Re Parker*, 4 H. & N. 666 (*post*, p. 1845); *Att.-Gen.* v. *Montefiore*, 21 Q. B. D. 461.

(*y*) Notwithstanding the fact that the exception created by this section is limited to bonds and contracts made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other *person*, a contract for valuable consideration to pay money on the death of the contracting party is not within the scope of the Act, nor does such a contract create a

16 & 17 Vict. c. 51. Exemptions.

Sect. 18. "Where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to the sum of 100*l.* (*z*), no duty shall be payable under this Act in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession, which, as estimated according to the provisions of this Act, shall be of less value than 20*l.* in the whole (*a*), or upon any moneys applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted (*b*) from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any

succession or make the vendor and purchaser thereunder predecessor and successor within the meaning of sect. 2 of the Act: see *Fryer* v. *Morland*, 3 C. D. 675. The 17th section therefore was unnecessary, and must be treated as inserted in the Act *ex cautelâ*. In short, the Act only grants a duty on successions to property by persons succeeding to estates by gratuitous title, the only exception being that marriage consideration is treated as if it were a gratuitous title: *per* Jessel, M. R., *ibid.* p. 681: the words "money or money's worth" appearing to have been selected for the purpose of excluding the marriage consideration. And cf. *Wolverton* v. *Att.-Gen.*, [1898] A. C. 535, as to the meaning of the expression "a contract made for valuable consideration in money or money's worth." Although a purchaser for money or money's worth of a reversion is not within the statute, yet if the purchase is made by trustees under a Will, and paid for out of the testator's estate, the beneficiaries entitled to the purchased estate are successors, liable to duty when the reversion falls into possession: *De Rechberg* v. *Beeton*, 38 C. D. 192. See also *Oldfield* v. *Preston*, 3 De G. F. & J. 398, in which case it was held that there was no succession as between the subscribers to a tontine. Cf. sect. 3 of the Finance Act, 1894, *ante*, p. 1713.

(*z*) Where the principal value of an estate does not exceed 100*l.* the estate is exempted from Estate duty. See sect. 17 of the Finance Act, 1894, *ante*, p. 1750. See also as to Legacy duty, *ante*, p. 1763, note (*b*).

(*a*) By sect. 10, sub-sect. 2, of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), it is provided that, subject to the relief given by sect. 18, Succession duty shall be charged on successions under 20*l.* in value.

(*b*) The exemptions here referred to are the special exemptions given by the Legacy Duty Acts, and the section does not extend to cases where no duty was imposed by those Acts; in effect the word "exempted" must be construed in its legal sense, and not as meaning "free from": *Att.-Gen.* v. *Fitzjohn*, 2 H. & N. 465; *Re Wallop's Trusts*, 1 De G. J. & S. 656, 672.

16 & 17 Vict. c. 51.

interest surrendered by him or extinguished before the time appointed for the commencement of this Act: and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property" (*c*).

Leasehold estates not to be charged with legacy duty as personal estate.

Sect. 19. "No legatee or other person shall, after the time appointed for the commencement of this Act, be chargeable under the Legacy Acts with duty, not then already due, in respect of any leasehold hereditaments (*d*) of any testator or deceased person, as belonging to the personal estate of the testator or deceased."

Duties to be paid on the successor becoming entitled in possession, but in the case of outstanding interests, on the determination thereof.

Sect. 20. "The duty imposed by this Act shall be paid at the time when the successor or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there shall be any prior charge, estate or interest not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate or interest shall, if not previously paid, compounded for or commuted, be paid at the time of such determination; and except that in case of an annuity or property hereby made chargeable as an annuity, the duties shall be paid by such instalments as are hereinafter directed or referred to; provided that no duty shall be payable upon the determination of any lease purporting at the date thereof to be a lease at rack-rent, in respect of the increase accruing to the successor upon such determination" (*e*).

The interest of a successor in real pro-

Sect. 21. "The interest of every successor, except as herein provided, in real property, shall be considered to be of the value

(*c*) See *Earl Howe* v. *Earl of Lichfield*, L. R. 2 Ch. 155; *Att.-Gen.* v. *Littledale*, L. R. 5 Ex. 275; L. R. 5 H. L. 290; *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548; *Wolverton* v. *Att.-Gen.*, [1898] A. C. 535.

(*d*) See definition of "real property" in sect. 1, *ante*, p. 1798.

(*e*) If, however, the prior charge, estate or interest, created by the successor himself, confers a new succession, the person who created the charge only pays the duty upon the increased value of his estate when the charge, estate or interest so created ceases: *Re Peyton*, 7 H. & N. 265, 287.

16 & 17 Vict. c. 51.

perty to be considered as an annuity.

of an annuity equal to the annual value of such property (*f*), after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due (*g*); provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by Will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest" (*h*).

(*f*) As to the meaning of the words "annual value of such property," see *Att.-Gen.* v. *Lord Sefton*, 2 Hurl. & C. 362; 11 H. L. C. 257. Stock produced by a sale of real estate under the London Dock Act (39 & 40 Geo. III. c. 47), subject to jointure, is real estate: *Shard* v. *Shard*, 14 Ves. 328.

(*g*) By the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 22, the successor has the option of paying half the Succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four further annual instalments, with interest at 4*l.* per cent. on the amount remaining unpaid. The rate of interest is now 3 per cent.; see sect. 18 of the Finance Act, 1896, *ante*, p. 1735.

(*h*) It has been held that the word "competent" in this section means to refer to the successor's interest in the property, and not to his understanding: *Att.-Gen.* v. *Hallett*, 2 H. & N. 368. The case is within the exception engrafted on the proviso notwithstanding the successor becomes competent by his own act after the time of his becoming successor. The power of a tenant in tail in possession to enlarge his estate so that he shall become

16 & 17 Vict. c. 51. Rules for valuing lands, houses, &c.

Sect. 22. "In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings" (*i*).

competent to dispose by Will of a continuing interest in the entailed property is incident to the estate which such tenant takes under the instrument creating the entail; and, if he exercises the power, he must be treated, for the purpose of Succession duty, as if he had succeeded to such enlarged estate. Thus where a tenant in tail executed a disentailing deed, and died before any instalment of duty under the Act became due, and his son and devisee (who but for the deed would have been the next tenant in tail) succeeded to the property, he was held liable to satisfy the duty which his father ought to have paid. The interest of the father became under such circumstances, according to the proviso in this section, a "continuing interest," of which the father was "competent to dispose by Will," and the duty was a "continuing charge on such interest": *Lord Lilford* v. *Att.-Gen.*, 3 H. & C. 239; 2 H. L. C. 63. Cf. expression "competent to dispose" in sect. 2 (1) (a) of the Finance Act, 1894, *ante*, pp. 1698 and 1702. The Finance Act, 1894, s. 18, which applies to persons dying after the 1st August, 1894, enacts as follows:—

Value of real successions for Succession duty.

"(1.) The value for the purpose of Succession duty of a succession to real property arising on the death of a deceased person shall, where the successor is competent to dispose of the property, be the principal value of the property, after deducting the Estate duty payable in respect thereof on the said death and the expenses if any properly incurred of raising and paying the same; and the duty shall be a charge on the property, and shall be payable by the same instalments as are authorised by this Act for Estate duty on real property, with interest at the rate of 3 per cent. per annum; and the first instalment shall be payable and the interest shall begin to run at the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profit thereof; and after the expiration of the said twelve months the provisions with respect to discount shall not apply.

"(2.) The principal value of real property for the purpose of Succession duty shall be ascertained in the same manner as it would be ascertained under the provisions of this Act for the purpose of Estate duty; and in the case of any agricultural property where no part of the principal value is due to the expectation of an increased income from such property, the annual value for the purpose of Succession duty shall be arrived at in the same manner as under the provisions of this Part of this Act for the purpose of Estate duty."

(*i*) The successor is not entitled under this section to a deduction for income tax or the agent's charge for collecting rents: *Re Elwes*, 3 H. & N. 719; nor to deduction

Sect. 23. "Where timber, trees, or wood, not being coppice or underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest in the net moneys, after deducting all necessary outgoings for the year, which shall from time to time be received from any sales of such timber, trees, or wood, and shall account for and pay the same yearly; provided that no duty shall be payable on the net moneys received from the sale of timber, trees, or wood in any one year, unless such net moneys shall exceed the sum of 10*l.*; provided, that if the successor shall be desirous of commuting the duty, and shall deliver to the commissioners an estimate of the net moneys obtainable by him from the sale of such timber, trees, and wood as may, in a prudent course of management of the property, be felled by such successor during his life, the commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly." 16 & 17 Vict. c. 51. Rule as to timber.

Sect. 24. "A successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such advowson, or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth for which the same, or any such presentation or interest, shall be so disposed of at the time of such disposal" (*k*). Rule as to advowsons.

Sect. 25. "Where a successor, entitled to any real property, subject to any lease by reason whereof he shall not be presently entitled to the full enjoyment thereof, shall not have paid duty in respect of the full yearly value of such property, he shall be chargeable with duty upon his interest in any fine or grassum or other consideration which may be received during his life for the renewal of any such lease, or the grant of any reversionary lease of the same property." Rule as to property subject to beneficial leases.

Sect. 26. "The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income shall either be calculated upon the average profits or income derived therefrom, after deducting all necessary outgoings, during such a number of preceding years as shall be agreed upon for this Rule as to manors, mines, &c.

for reasonable expenses of trustees acting under authority of the Will: *Re Earl Cowley*, L. R. 1 Ex. 288.

(*k*) Cf. sect. 15 (4) of the Finance Act, 1894.

16 & 17 Vict. c. 51.

purpose between the commissioners and the successor, before the first payment of duty on the succession shall have become due; or if no such period shall be agreed upon, then the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest calculated at the rate of 3*l.* per centum per annum on the amount of such principal value" (*l*).

Duty payable by corporations, &c., taking real estates.

Sect. 27. "Where any body corporate, company, or society shall become entitled, as successors, to any real property, the duty in respect thereof shall be assessed upon the principal value of such property, but shall be payable by such instalments, at such times, and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee simple; and it shall be lawful for such body corporate, company, or society, or any trustee thereof, to raise the amount of any duty due in respect of their succession upon the security thereof, at interest, with power for them to give effectual discharges for the money so raised" (*m*).

Allowance for fines, &c., paid by successor.

Sect. 28. "If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, shall be subject to any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure thereof, and due in respect of his succession, he shall be entitled to have a deduction allowed to him of the amount of such fines, casualties, compositions, reliefs, or charges from the assessable value of his interest in such copyhold or other real property."

Real property directed to be sold to be charged as personalty.

Sect. 29. "The interest of any successor in moneys to arise from the sale of real property under any trust for the sale thereof, so far as the same shall not be chargeable with duty under the Legacy Duty Acts (*n*), shall be deemed to be personal property chargeable with duty under this Act; provided that where such moneys shall be subject to any trust for the re-investment thereof in the purchase of other real property, to

(*l*) Cf. sect. 7 (5) of the Finance Act, 1894, as to estimating "principal value" for the purposes of Estate duty.

(*m*) See *Sol.-Gen.* v. *Law Reversionary Interest Society*, L. R. 8 Ex. 233.

(*n*) See *ante*, pp. 1764, 1794, and *post*, p. 1838. By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2), as to any person dying on or after 1st July, 1888, it is provided that legacies payable out of or charged upon real estate, or the proceeds thereof, shall not be chargeable with Legacy duty, but with Succession duty.

which the successor would not be absolutely entitled, such moneys shall be deemed to be real property, and for the purpose of this Act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall then be the real property subject to the trust or direction for sale, or any property purchased in substitution for it, or any intermediate investment of the produce of the sale of the original property."

16 & 17 Vict. c. 51.

Sect. 30. "The interest of any successor in personal property, subject to any trust for the investment thereof in the purchase of real property to which the successor would be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as personal property; and personal property subject to any trust for the investment thereof in the purchase of real property to which the successor would not be absolutely entitled shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as real property: and for the purposes of this Act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase" (*o*).

Personal property to be invested in real property, how to be charged.

Sect. 31. "Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the Thirty-

Annuities under this Act and the Legacy Duty Acts to be valued according to the tables annexed to this Act.

(*o*) In *Re De Lancey*, L. R. 4 Ex. 345; 5 Ex. 102, it was held that money left by Will to be applied in the purchase of real estate is chargeable, so long as it is not actually so applied, with duty under the Legacy Duty Acts, and not under this section, however it may devolve. See 36 Geo. III. c. 52, s. 19, *ante*, p. 1778.

16 & 17 Vict. c. 51.

sixth year of the Reign of King George the Third, chapter fifty-two, and such annuity or interest shall be chargeable with duty accordingly."

Provisions as to the assessment of personalty.

Sect. 32. "The following provisions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases, namely, sects. 8, 10, 11, 12, 14 and 23 of the said Act of the Thirty-sixth year of the Reign of King George the Third, chapter fifty-two, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions, and as if the tables in the said Act referred to were the tables in the schedules annexed to this Act" (*p*).

Allowance to donee of general power of appointment.

Sect. 33. "Where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property" (*q*).

What allowance to be made for incumbrances.

Sect. 34. "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may previously to his possession

(*p*) Where a person absolutely entitled to a reversionary interest in personalty settled the same on the usual trusts of a marriage settlement, and on the reversion falling in, paid the whole of the Succession duty which had become payable thereon out of his own moneys, it was held, having regard to this section, that he was entitled to be repaid out of the corpus of the fund, and to have the trustees raise the necessary amount: *Cuddon* v. *Cuddon*, 4 C. D. 583. "The 32nd section says this, that certain provisions of the Legacy Duty Act, specified in the section, shall apply 'to the personal property comprised in any succession and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions.' That is, those sections apply when they have any application": *per* Jessel, M. R., *Att.-Gen.* v. *Noyes*, 8 Q. B. D. 125, 138.

(*q*) Owners in fee simple are not equivalent to donees of a general power of appointment within the meaning of this section: *Re Cooper and Allen's Contract*, 4 C. D. 802, 823.

have laid out in the substantial repairs or permanent improvement of real property comprised in his succession; provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value *pro tanto* of such real property" (*r*). 16 & 17 Vict. c. 51.

Sect. 35. "In estimating the value of a succession no allowance shall be made in respect of any contingent incumbrance thereon; but in the event of such incumbrance taking effect as an actual burden on the interest of the successor, he shall be entitled to a return of a proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect" (*s*). No allowance to be made in respect of contingent incumbrances, unless they take effect.

Sect. 36. "In estimating the value of a succession no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person; but in the event of the same so passing the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest." The duty on successions to be calculated without regard to contingencies.

Sect. 37. "Where a successor shall not have obtained the whole of his succession at the time of the duty becoming payable, he shall be chargeable only with duty on the value of the property or benefit from time to time obtained by him; and whenever any duty shall have been paid on account of any succession, and it shall afterwards be proved to the satisfaction of the commissioners that such duty, not being due from the person paying the same, was paid by mistake, or was paid in respect of property which the successor shall have been unable to recover, or from or of which he shall have been evicted or deprived by any superior title, or that for any other reason it ought to be refunded, the commissioners shall thereupon refund the same to the person entitled thereto." Provision for allowance or return of duty.

Sect. 38. "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of Allowance to be made to successor in respect of relinquished property.

(*r*) See as to the construction of this section, *Re Peyton*, 7 H. & N. 265.

(*s*) As to incumbrances conferring a new succession, see *ante*, sect. 15, p. 1808.

16 & 17 Vict. c. 51.

the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property" (*t*).

Power for commissioners to compound duties.

Sect. 39. "Where, in the opinion of the commissioners, any succession shall be of such a nature, or so disposed or circumstanced, that the value thereof shall not be fairly ascertainable under any of the preceding directions, or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty thereon, the commissioners shall think it expedient to exercise this present authority, it shall be lawful for them to compound the duty payable on the succession upon such terms as they shall think fit, and to give discharges to the successor, upon payment of duty according to such composition; and it shall be lawful for them, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty" (*u*).

Power of commissioners to receive duty in advance.

Sect. 40. "It shall be lawful for the commissioners to receive any duty tendered to them in advance, and to allow discount thereon at the rate of 4*l.* *per centum per annum*, or at such other rate as may from time to time be directed by the

(*t*) Under this section it was held that if a tenant for life and his son, the first tenant in tail under a Will or a previous settlement, resettle the estate, and by such resettlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the Succession duty under this section, an allowance made to the son in respect of the amount of the annuity: *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150; *Commrs. of Inland Revenue* v. *Harrison*, L. R. 7 H. L. 1. See *Le Marchant* v. *Commrs. of Inland Revenue*, L. R. 10 Ex. 292; 1 Ex. D. 185, *contra*, *Att.-Gen.* v. *Sibthorp*, 3 H. & N. 424. The section applies to the relinquishment of a benefit, not, for instance, in the case of a purchaser who has purchased the fee from tenant for life and remainderman, the life interest which expires on the death of the tenant for life, and therefore cannot be dealt with, but some existing thing which otherwise the successor would be entitled to: *per* Jessel, M. R., in *Re Cooper and Allen*, 4 C. D. 802, 822.

Now by sect. 10 (1) of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), it is provided that the allowance under this sect. 38 shall only be made in respect of property which the successor may have acquired by a title not conferring a succession on him, and which passes from the successor to some other person.

(*u*) Cf. powers to accept composition for death duties under sect. 13 of the Finance Act, 1894, *ante*, p. 1744.

commissioners of her Majesty's Treasury; and no person by reason of his having made any payment of duty in advance, shall be prejudiced in his right to have any repayment of duty made to him to which he may become entitled under any of the provisions of this Act." 16 & 17 Vict. c. 51.

Sect. 41. "It shall be lawful for the commissioners, in their discretion, upon application made by any person who shall be entitled to a succession in expectancy, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid, and for assessing the amount which shall be so payable they shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the commissioners in respect of duties paid in advance; and upon the receipt of such certain sum they shall give discharges to the successor accordingly" (*x*). Power for commissioners to commute future duties.

Sect. 42. "The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed (*y*); and such duty shall also be a first Duty to be a first charge on property.

(*x*) By sect. 11 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), it is provided that: "Where any Legacy duty or Succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest should have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee or other person who would be accountable for the duty in respect of such interest in expectancy if it were then in possession, to commute the duty presumptively payable for a certain sum to be presently paid. For assessing the amount which shall be so payable the commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the commissioners in respect of duties paid in advance under the Succession Duty Act, 1853. Upon the receipt of the certain sum the commissioners shall give a discharge for the duty accordingly."

As to commutation of Estate duty on interests in expectancy, see Finance Act, 1894, s. 12, *ante*, p. 1744.

(*y*) Cf. sect. 9 (1) of the Finance Act, 1894, *ante*, p. 1732.

16 & 17 Vict. c. 51.

charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the Crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession: provided that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exerciseable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys" (*z*).

Provision for the separate assessments of properties.

Sect. 43. "The commissioners shall, at the request of any successor, or any person claiming in his right, accept or cause to be made so many separate assessments of the duty payable in respect of the interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required; and in such cases the respective properties shall

(*z*) The operation of the 42nd section of the Succession Duty Act on an exercise of a power of sale is to shift the duty to the purchase-money or its investments: *Dugdale* v. *Meadows*, L. R. 6 Ch. 501. And the operation of the section is the same where the sale is under the powers conferred by the 22nd section of the Settled Estates Act, 1877, or the Settled Land Act, 1882: *Re Warner's Settled Estates*, 17 C. D. 711. And see Wolstenholme's Conveyancing and Settled Land Acts, 8th edit. p. 339.

Where a testator had entered into a covenant to pay a sum of money to the trustees of the marriage settlement free from all deductions, the trustees of the settlement and not the executors are liable for Succession duty: *Re Higgins*, 3 C. D. 142.

As to limitation of time for recovering Succession duty, see *post*, p. 1862.

be chargeable only with the amount of duty separately assessed in respect thereof: and it shall be lawful also for the commissioners, by their certificates, to be issued in such form as they shall think fit, from time to time to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment shall have been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution." 16 & 17 Vict. c. 51.

What persons accountable for duty (*a*).

Sect. 44. "The following persons, besides the successor, shall be personally accountable to her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement of this Act; that is to say, every trustee, guardian, committee, tutor, or curator, or husband in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession (*b*); and all such trustees, guardians, committees, tutors, curators, husbands, and persons shall be authorized to compound or pay in advance or commute any duty, and retain (*c*) out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor; and in the event of the non-payment of such duty as aforesaid every person hereby made accountable shall be a debtor to her Majesty in the amount of the unpaid duty for which he shall be so accountable" (*d*).

Notice of succession to be given to the commis-

Sect. 45. "The persons hereby made accountable for the payment of duty in respect of any succession, or some of them,

(*a*) See *post*, p. 1853 *et seq.*

(*b*) Cf. the language of sect. 8 (4) of the Finance Act, 1894, *ante*, p. 1727.

(*c*) Cf. sect. 5 of 45 Geo. III. c. 28, *ante*, p. 1795.

(*d*) The executor paying a debt is not accountable as a trustee within the meaning of this section: *Re Higgins*, 31 C. D. 142. As to the liability of an executor paying a legacy under sect. 6 of 36 Geo. III. c. 52, see *ante*, p. 1768.

16 & 17 Vict. c. 51.
sioners and a return of the property made.

shall, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same or any part thereof to or for the successor or any person in his right, and in the case of real property when any duty in respect thereof shall first become payable, give notice to the commissioners or to their officers of their liability to such duty, and shall at the same time deliver to the commissioners or to their officers a full and true account of the property for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed by them, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as shall be necessary or proper for enabling the commissioners fully and correctly to ascertain the duties due; and the commissioners, if satisfied with such account and estimate as originally delivered, or with any amendments that may be made therein upon their requisition, may assess the Succession duty on the footing of such account and estimate; but it shall be lawful for the commissioners, if dissatisfied with such account and estimate, to cause an account and estimate to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last-mentioned account and estimate, subject to appeal, as hereinafter provided; and if the duty so assessed shall exceed the duty assessable according to the return made to the commissioners, and with which they shall have been dissatisfied, and if there shall be no appeal against such assessment, then it shall be in the discretion of the commissioners, having regard to the merits of each case, to charge the whole or any part of the expenses incident to the taking of such last-mentioned account and estimate on the interest of the successor, in respect whereof the duty shall be due, in increase of such duty, and to recover the same forthwith accordingly; and if there shall be an appeal against such last-mentioned assessment, then the payment of such expenses shall be in the discretion of the Court of Appeal hereinafter appointed" (*e*).

Penalty on not giving notices of suc-

Sect. 46. "If any person required to give any such notice or deliver such account as aforesaid shall wilfully neglect to do so

(*e*) By 52 & 53 Vict. c. 7, s. 10 (3), it is provided that if the commissioners are dissatisfied with an account and estimate delivered under this section they may, subject to appeal, assess the duty or proceed as this section directs.

at the prescribed period, he shall be liable to pay to her Majesty a sum equal to 10*l.* *per centum* upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than 1*l.* *per centum* upon the value thereof, upon such less sum as such duty, if assessable at the rate of 1*l.* *per centum* upon the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue; and if any person liable under this Act to pay any duty shall, after such duty shall have been finally ascertained, wilfully neglect to do so within twenty-one days, he shall also be liable to pay to her Majesty a sum equal to 10*l.* *per centum* upon the amount of duty so unpaid, or upon such less sum as such duty, if assessable at the rate of 1*l.* *per centum* on the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue."

16 & 17 Vict c. 51.

cession, and on not paying duty when ascertained.

Sect. 49. "Every person who under the provisions of this Act may deliver any account or estimate of the property comprised in any succession shall, if required by the commissioners, produce before them such books and documents in the custody or control of such person, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining such property and the duty payable thereon: and the commissioners may, without payment of any fee, inspect and take copies of any public book; but all such information shall be deemed to be confidential, and the commissioners shall not disclose the same, or the contents of any document or book, to any person, otherwise than for the purposes of this Act."

Accounting party to verify his account by production of books and documents, and commissioners may, without fee, inspect and take copies of public books.

Sect. 50. "It shall be lawful for any accountable party dissatisfied with the assessment of the commissioners, upon giving, within twenty-one days after the date of such assessment, notice in writing to the commissioners of his intention to appeal against such assessment, and a statement of the grounds of such appeal, such statement to be furnished within the further period of thirty days, to appeal by petition accordingly to her Majesty's Court of Exchequer in England (*f*), Scotland, or Ireland, according to the place in which the appellant shall be resident;

Power for accountable party to appeal.

(*f*) Now to the King's Bench Division of the High Court of Justice, by virtue of the Judicature Act, 1873, sect. 16, and the Order in Council of 16th December, 1880.

16 & 17 Vict. c. 51.

and every such Court, or any judge thereof sitting in chambers, shall have jurisdiction to hear and determine the matter of such appeal and the costs thereof, with power to direct, for the purposes of such appeal, any inquiry, valuation, or report to be made by any officer of the Court, or other person, as such Court or judge may think fit: Provided, that where the sum in dispute in respect of duty on such assessment does not exceed 50*l.*, the accountable party may, having given notice of appeal and delivered a statement of the grounds thereof as hereinbefore directed, appeal to the judge of the County Court in England, the Sheriff Court in Scotland, or the Assistant Barrister's Court in Ireland, for the district, county, or division in which the appellant shall be resident, or the property be situate; and every such judge shall have jurisdiction to hear and determine the matter of such last-mentioned appeal, with the like power and authority as are by this section given to a judge of her Majesty's Court of Exchequer" (*g*).

Duty to be entered by the commissioners in a book, and a stamped receipt to be given.

Sect. 51. "Whenever any payment of duty shall be made under this Act, the same shall be entered in a book to be kept by the commissioners for this purpose, and the receiver general of inland revenue or other proper officer appointed by the commissioners, shall give a receipt for the same in such form as they shall think fit, and stamped with the proper stamp for denoting the rate of duty, and the commissioners shall from time to time deliver to any person interested in any property affected by such duty, on applying for the same for any reasonable purpose approved by the commissioners, a certificate in such form as they may think fit, of such payment" (*h*).

Protection to *bonâ fide* purchasers.

Sect. 52. "Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof shall exonerate a

(*g*) A right of appeal was given from the decision of the Court or judge to the Exchequer Chamber, and then to the House of Lords, by stat. 28 & 29 Vict. c. 104, s. 59. Now by the Judicature Act, 1873, s. 18, sub-s. 4, the jurisdiction of the Court of Exchequer Chamber has been transferred to the Court of Appeal. By Ord. 68, r. 2, Ord. 58 as to appeals was, so far as applicable, made to apply to all proceedings on the revenue side of the King's Bench Division. Cf. sect. 10 of the Finance Act, 1894, as to appeals from decisions of the Commissioners with respect to Estate duty.

(*h*) See *Earl Howe* v. *Earl of Lichfield*, L. R. 1 Eq. 641; L. R. 2 Ch. 155.

bonâ fide purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession shall be subject to any duty with which such property may be chargeable under the provisions of this Act, by reason of any extrinsic circumstances of which he shall not have had notice at the time of such purchase." 16 & 17 Vict. c. 51.

Sect. 53. "Whenever any suit shall be pending in any Court for the administration of any property chargeable with duty under this Act, or the Legacy Duty Acts, such Court shall provide, out of any property which may be in the possession or control of the Court, for the payment of duty to the commissioners." Courts in suits for the administration of property to provide for payment of duty.

Sect. 54. "This Act shall be taken to have come into operation on the 19th day of May, 1853, and shall take effect accordingly." Commencement of Act.

Sect. 55. "This Act may be cited for all purposes as 'The Succession Duty Act, 1853.'" Short title.

By stat. 28 & 29 Vict. c. 104, sects. 47 and 48 of the 16 & 17 Vict. c. 51 (Succession Duty Act), sects. 12, 13, 14, and 15 of 22 & 23 Vict. c. 21, and the first section of the stat. 24 & 25 Vict. c. 92, are repealed, and by sect. 55 it is enacted, "If any person accountable and chargeable with duty under the Succession Duty Act or the Legacy Duty Acts required by the Commissioners of Inland Revenue to deliver an account under those Acts or any of them makes default in doing so, the commissioners may sue out of the Court of Exchequer a writ of summons commanding him to deliver an account, and to pay the duty and the costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order shall be made as seems just." Stat. 28 & 29 Vict. c. 104, s. 55, for summary proceedings for account and payment of Succession and Legacy duty.

And by sect. 56, "where, in pursuance of the Succession Duty Act or the Legacy Duty Acts, the Commissioners of Inland Revenue make an assessment of duty, and the duty is not paid, and there is no notice of appeal against the assessment under sect. 50 of the Succession Duty Act (*i*), or of disputing the liability to assessment (*k*), the commissioners may sue out of the Sect. 56. Summary proceedings for payment of Succession or Legacy duty assessed.

(*i*) *Ante*, p. 1825.

(*k*) Where the liability to assessment is disputed the practice is to try the question on an information

16 & 17 Vict. c. 51.

Court of Exchequer (*l*) a writ of summons commanding the person liable for the duty, or the owner of any property expressly charged therewith, to pay the duty payable by him and the costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order shall be made as seems just."

Sect. 58.

By sect. 58, in such proceedings the Court may refer the matter to the proper officer for his report, and may therefore order a special case, and may give judgment thereon subject to proceedings in error.

Sects. 59, 60.

By sects. 59 and 60, in such proceedings by writ of summons an appeal is given to the Exchequer Chamber (*m*), and thence to the House of Lords.

52 & 53 Vict. c. 7, s. 6. Temporary Estate duty on successions.

By stat. 52 & 53 Vict. c. 7, sect. 6, it is enacted that—

(1.) "Where the value of any succession upon the death of any person dying on or after June 1st, 1889, chargeable with duty under the Succession Duty Act, 1853 (*n*), and the Customs and Inland Revenue Act, 1888 (*o*), exceeds 10,000*l.*, and where the value of any succession to real property under the Will or intestacy of any person so dying chargeable with duty under the said Act does not exceed 10,000*l.*, but such value together with the value of any other benefit taken by the successor under such Will or intestacy exceeds 10,000*l.*, a separate statement of the value of the succession shall be delivered to the Commissioners of Inland Revenue together with the account to be delivered under sect. 45 (*p*) of the said Act."

(2.) "There shall be charged and paid on every statement to be delivered in conformity with this section, in respect

filed by the Crown: Ord. 68, r. 1, of the R. S. C. provides that subject to the provisions of this Order, nothing in the rules, save as expressly provided, shall affect the procedure or practice in proceedings on the revenue side of the King's Bench Division. As to the practice with regard to the information, see notes in Annual Practice, 1904, under this Order, and *ante*, p. 1726, n. (*s*).

(*l*) Now the King's Bench Division, by virtue of the Judicature Act, 1873, s. 16 (4), and the Order in Council of 16th December, 1880.

(*m*) Now by the Judicature Act, 1873, s. 18, sub-s. 4, the jurisdiction of the Court of Exchequer Chamber has been transferred to the Court of Appeal.

(*n*) 16 & 17 Vict. c. 51. See *Att.-Gen.* v. *Aberdare*, [1892] 2 Q. B. 684.

(*o*) 51 Vict. c. 8.

(*p*) See *ante*, p. 1823.

of the value of the succession, a duty of 1*l.* for every full sum of 100*l.* and for any fraction of 100*l.* over any multiple of 100*l.* of such value." 52 & 53 Vict. c. 7, s. 6.

(3.) Exempts leaseholds included in an account delivered according to sect. 38 of the Customs and Inland Revenue Act, 1881.

(4.) Makes this duty additional (*q*).

(5.) "The value upon which the duty imposed by this section in respect of a succession to real property is to be charged and assessed shall be ascertained in accordance with the Succession Duty Act, 1853, subject to the following provisions:

"(a) In the case of a successor who is entitled to the real property comprised in his succession for an estate in fee simple or in fee according to the custom of any manor or for lives renewable under any custom or under any lease for lives or for any estate in tail or under an entail under which he can acquire the property in fee simple without consent of any person or is entitled to any such property for life and competent to dispose as he shall think fit of a continuing interest therein, the value shall be the principal value of such property based upon the annual value estimated after making such allowances (if any) as ought to be made under the said Act. The duty payable in respect of such principal value shall not in any case exceed the amount which would be chargeable upon an annuity equal to such annual value according to the highest value in Table III. in the Schedule of the Succession Duty Act, 1853;

"(b) In the case of an increase of benefit accruing to a successor and chargeable to Succession duty by reference to sects. 5, 20, or 25, of the Succession Duty Act, 1853 (*r*), where the value of the succession apart from the increase of benefit shall exceed 10,000*l.*, such increase of benefit shall be chargeable with duty under this section whatever may be the value thereof; and where the value of the succession, apart from the increase of benefit, shall not exceed 10,000*l.* the value of such increase of benefit, as well as of every preceding increase of

(*q*) The effect of this sub-section is to incorporate into sub-sect. 1 the definition of the term "succession" contained in sect. 1 of the Succession Duty Act, 1853 (*ante*, p. 1799): *Att.-Gen.* v. *Aberdare*, [1892] 2 Q. B. 684.

(*r*) *Ante*, pp. 1803, 1812, 1815.

52 & 53 Vict. c. 7, s. 6.

benefit, shall be added to the value of the succession for the purpose of the said duty."

(6.) The duty imposed by this section shall in the case of real property be a first charge thereon or on the interest of the successor therein, according as the duty is or is not chargeable on the principal value of such property, and shall be paid in like manner as if the duty were a part of the Succession duty payable under sect. 22 of the Customs and Inland Revenue Act, 1888, and together with the payments in respect of that duty.

Duration of charge of Estate duty.

By sect. 7, the additional duty is not to be payable in respect of the value of the estate and effects of any person dying on or after June 1, 1896.

Double duty or interest payable in case of default.

By sect. 8, double duty or interest is payable in case of default.

Duties to be stamp duties.

By sect. 9, the duties are to be Stamp duties, and the required statements are to be in the prescribed form (*s*).

By the Finance Act, 1894, it is provided that the temporary Estate duties imposed by sects. 5 and 6 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), shall not be levied in respect of property chargeable with Estate duty under the Act of 1894.

Having thus collected the principal statutory provisions now in force with respect to duties on legacies and successions, it remains to point out, more fully, the construction which has been put on these Acts by the Courts of Law and Equity: and

(*s*) This was a new duty, and an additional duty upon large estates which pass in consequence of a death, not an additional property tax on large benefits which are received by individuals in consequence of a death. The intention of sect. 5 was to give the new duty whenever the whole estate of a testator exceeded 10,000*l.* without reference to the amount taken by any particular beneficiary. So also under sect. 6, the whole fund and not the interest in it of any individual successor is the "succession," the value of which is referred to in the words, "where the value of 'any succession' exceeds 10,000*l.*;" but "succession" means any one succession, *i.e.*, the duty was made payable where the value of the one fund which passed upon the death of a predecessor, as the result of one disposition or devolution exceeded 10,000*l.* It does not mean that duty was to be payable wherever all the property whatsoever, which passed upon the death of the predecessor, was more than 10,000*l.* See *Att.-Gen.* v. *Aberdare*, [1892] 2 Q. B. 684, 690.

for this purpose, it is proposed to consider, 1st, the amount of duties payable; 2ndly, on what subjects the duties are payable; 3rdly, by whom the duties are payable. 52 & 53 Vict. c. 7, s. 6.

SECTION III.

As to the Amount of Duties payable on Legacies and Successions.

It was formerly often material to ascertain under what circumstances a legacy might be said to be "paid, delivered, retained, satisfied, or discharged," within the meaning of the statute. What shall be considered a legacy paid.

But because of the length of time which has elapsed since the passing of 55 Geo. III. c. 184, a mere reference to the cases which have been decided on the meaning of the above words is considered sufficient (*t*). And further, it would seem that cases which formerly escaped duty on the construction put on the above words would now be hit by the Succession Duty Act, and therefore *quâcunque viâ* duty would be paid.

Formerly, a question, with respect to the amount of the duties payable, arose in the instance of legacies given to a husband and wife for life, in a case where the one is of kin to the testator, so as to be within the lower scale of duties, and the other a stranger in blood, so as to be within the highest (*u*). Amount of duty payable in case of a legacy to husband and wife, where the one is a child of the testator and the other a stranger.

But by the 11th section of the Succession Duty Act it is provided in the case of legacies given to any married person by testators dying after May 19th, 1853, as well as in case of successions under that Act, that duty shall be paid at the lower rate if the husband or wife of such person would have been chargeable on a lower scale had the legacy been given to him or her (*x*).

It may be remarked, that the Acts do not specify any time at which the executor or administrator must render his final or residuary account at the stamp office; for the obvious reason, that the peculiar circumstances of the property of the deceased would, in many cases, preclude the possibility of complying In what cases duty is payable on the interest as well as the principal of a legacy.

(*t*) *Att.-Gen.* v. *Manners*, 1 Price, 411; *Att.-Gen.* v. *Wood*, 2 Y. & J. 290; *Hill* v. *Atkinson*, 2 Meriv. 45; *Coombe* v. *Trist*, 1 My. & Cr. 69; *Att.-Gen.* v. *Hancock*, 2 M. & W. 563; *Att.-Gen.* v. *Loscombe*, 5 H. & N. 564.

(*u*) *Att.-Gen.* v. *Bacchus*, 9 Price, 30; *Att.-Gen.* v. *Burnie*, 3 Y. & J. 531.

(*x*) See *ante*, p. 1807.

with any such restriction: But the duty must be paid on the accruing profits and income of the effects of the deceased, from the time of his death to that of delivering the account and offering to pay the duty at the stamp office (*y*). In *The Att.-Gen.* v. *Cavendish* (*z*), the facts were as follows: Lord F. Cavendish died in October, 1803, and on the 20th of July, 1808, the defendant, as executor and residuary legatee, delivered in his residuary account of the testator's personal estate intended to be retained by him, and offered to pay the duty on the residuary estate, exclusive of the interest which had accrued since the testator's decease, 324*l.* less than it would have been had the duty been computed on the interest accrued: And it was decided that the duty was payable on the interest accrued from the death up to the time of the delivering of the account.

So in *Thomas* v. *Montgomery* (*a*), it was held that when a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee (*b*).

But it was held by the Court of Exchequer, in *The Att.-Gen.* v. *Holbrook* (*c*), that where by a Will a specific debt is forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt, between the time of such death and the period when the executors close their accounts.

SECTION IV.

Upon what Subjects the Duties are Payable.

What are to be regarded as legacies payable out of personalty.

It has appeared that legacies of every description, given by Will or other testamentary instrument (*d*), payable out of personal estate, including donations *mortis causâ* (*e*), and whether given by way of annuity or otherwise (*f*), and also legacies given subject to contingencies (*g*), are liable to the duties imposed by the statute 55 Geo. III. c. 184.

(*y*) 1 Rop. Leg. 787, 3rd edit.
(*z*) Wightw. 82.
(*a*) 3 Russ. Chanc. Cas. 582.
(*b*) See also accord. *Bate* v. *Payne*, 13 Q. B. 900, as to profits accruing on leaseholds.
(*c*) 3 Younge & Jerv. 114.
(*d*) *Ante*, p. 1763.
(*e*) *Ante*, pp. 1771, 1797.
(*f*) *Ante*, pp. 1771, 1797.
(*g*) *Ante*, p. 1777.

Leaseholds.

As to leaseholds, the Succession Duty Act (sect. 19) provides that after May 19th, 1853, they shall not be chargeable with legacy duty, but (sect. 1) shall be included in the term "real property," and, as such, be liable to Succession duty (*h*).

There has already been occasion to consider generally what instruments are to be regarded as testamentary (*i*). But it may be proper to inquire more particularly into the question with reference to Legacy duty.

What is a testamentary instrument:

In *The Att.-Gen.* v. *Jones* (*k*), a man conveyed by deed, for a nominal consideration, his leasehold and personal property to trustees, for the use of himself for life, and several persons therein named at his death, with a power reserved of revocation or alteration of the trusts: He never parted with the deed, or with any part of the property during his life; and he confirmed in most respects such disposition of it by Will at his death: And it was held by the Court of Exchequer (Wood, B., *dissentiente*), that the two instruments should be considered as to be taken and construed together as testamentary instruments, and that the property passing under them should pass as legacies, and be subject to duty.

This decision was questioned in subsequent cases, but the question of its propriety has ceased to be of any practical importance since cases of this kind, which occur after May 19th, 1853, will fall within the operation of sect. 8 of the Succession Duty Act (*l*).

In *Woodbridge* v. *Spooner* (*m*), where the deceased, in her lifetime, gave to the plaintiff a promissory note to pay him or order "on demand the sum of 100*l.* for value received and his kindness to me," with a verbal engagement on the part of the plaintiff, that the note should not be demanded until after her death, it was holden by the Court of King's Bench, that parol evidence could not be received to show that it was not given for a valuable consideration: and that such a note did not operate by way of testamentary disposition: nor was it void on the ground that it was a fraud on the Legacy duty, that duty never having attached upon it, and there being nothing to show that the amount passed by way of a *donatio mortis causâ* (*n*).

(*h*) *Ante*, p. 1812.

(*i*) See *ante*, p. 81 *et seq.* See also *Gaskell* v. *Gaskell*, 2 Y. & J. 502; and the remarks by Wood, V.-C., on that case, 4 K. & J. 214, 215.

(*k*) 3 Price. 368.

(*l*) *Ante*, p. 1804.

(*m*) 1 Chitt. Rep. 661; *S. C.*, 3 Barn. & Ald. 233.

(*n*) But in a case which occurred

With respect to the suggestion of fraud on the Legacy duty, it was said by Lord Lyndhurst in *Re Evans* (*o*), that every subject has a right so to shape the disposition of his property as to avoid the Legacy duty, if possible, and that there is no fraud in so doing, but now to cases of this kind also, which occur after the Succession Duty Act has come into operation, sect. 8 of that statute appears to have been intended to apply (*p*).

money taken under a testamentary appointment by virtue of a power:

The duties imposed by the Legacy Duty Acts are payable, not only upon a legacy payable out of the personal estate, strictly considered of the testator, but out of any personal estate which the testator had the power of disposing of, as he or she might think proper: Thus in *Re Cholmondeley* (*q*), by the marriage settlement of Mrs. Cholmondeley, 20,000*l.* was vested in trustees, upon trusts to pay the dividends to Sir Philip Francis for life, and after his death to Mr. Cholmondeley for his life, with remainder to Mrs. Cholmondeley for her life, and with a power of appointment amongst her children, in case there should be any; and, in default of issue, to such persons as she should by Will appoint, in case she died in her husband's lifetime, or by deed or Will, in case she should survive her husband; and in default of appointment, amongst her next of kin: Mrs. Cholmondeley died in her husband's lifetime, having, by her Will, appointed this sum of 20,000*l.* to certain persons mentioned in her Will: And the Court of Exchequer held, that Legacy duty was payable on the 20,000*l.*: The Barons were of opinion that, taking together all the Acts, applicable to the same subject, and passed *in pari materiâ*, and the Legislature in the 36 Geo. III. (*r*), and the 45 Geo. III. (*s*), having described and defined what they meant by a legacy, it was impossible to come to a conclusion

after the Wills Act, where among the testator's papers two letters were found, sealed and directed "For Sarah Gough, my late servant," each containing a promissory note signed by him, and one of the letters stated that the deceased enclosed 200*l.* as a mark of respect, and the other, that the enclosed was for her long and faithful services, it was held, that the notes were, in effect, invalid testamentary instruments and void: *Gough* v. *Findon*, 7 Exch. 48.

(*o*) 2 Cr. M. & R. 221. See also *Farquharson* v. *Cave*, 2 Coll. 366; *Vandenberg* v. *Palmer*, 4 K. & J. 215.

(*p*) See *ante*, p. 1804, and p. 1797, note (*b*).

(*q*) 1 Crompt. & Mees. 149; *S. C.*, 3 Tyrwh. 10.

(*r*) See *ante*, pp. 1770, 1771.

(*s*) See *ante*, p. 1794. See also stat. 8 & 9 Vict. c. 76, s. 4, *ante*, pp. 1796, 1797.

that they meant to use that term in a more limited sense in the statute of 53 Geo. III.

In *Platt* v. *Routh* (*t*), John Ramsden, by his Will dated the 10th of March, 1825, after giving various legacies, and directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter Judith Ann Platt, and three other persons, his executrix and executors, upon trust to permit his said daughter to receive the interest and dividends thereof during her life, and after her death (subject to certain payments then to be made) upon trust for such person or persons, *other than and except Joseph Woodhead and his relations, Moses Hoper and his relations, and the relations of the late husband of his said daughter and every of them*, in such parts, shares, and proportions, and in such manner and form as the said Judith A. Platt, whether sole or covert, should by Will appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden; and the testator declared, that in case his said daughter should intermarry with the said Joseph Woodhead or any of his relations, or should reside with or receive visits from him or them, then the bequest in her favour should utterly cease: The testator died in May, 1825, and his Will was duly proved by his executrix and executors: After his death, the said Judith A. Platt married George E. Platt, and the interest and dividends of the testator's residuary estate (which was very considerable), were regularly paid to her until her death, on the 7th of September, 1837: In April, 1837, she made a Will, and thereby, in exercise of the power under her father's Will, she gave 10,000*l.* Consols to the descendants of the before-named Dyson Ramsden, and all the rest of her late father's property to various persons, strangers in blood both to her father and herself: By order of the Master of the Rolls, a case was stated for the opinion of the Barons of the Exchequer, as well as to the liability of Judith A. Platt's Will to probate duty, as also as to the Legacy duty payable in respect of the bequests contained in the two Wills: Their Lordships thought that the question, so far as regarded the Legacy duty, depended entirely upon the construction to be put upon sect. 18 of the 36 Geo. III. c. 52 (*u*), which regulates the duty in cases where legacies are given subject to power of appointment; and they were of opinion, that the power under consideration must

(*t*) 6 Mees. & W. 756. (*u*) *Ante*, p. 1777.

be treated as a general and absolute power within the meaning of that section: The Barons were also of opinion, that according to the true construction of the 7th section of the same statute (*x*), the property subject to the power was personal estate, which Judith A. Platt had power to dispose of as she should think fit: Their Lordships accordingly certified to the Master of the Rolls their opinion, that, on the death of Judith Ann Platt, a duty of 1 per cent. became payable in respect of the bequest in the Will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof: And also their further opinion, that Legacy duty was payable in respect of the bequest contained in the Will of the said Judith Ann Platt, at the same rate at which it would have been payable, if they had been mere legacies given by her, payable out of her own personal estate. This opinion of the Barons was afterwards affirmed by the decree of Lord Langdale (*y*), and finally by the decision of the House of Lords (*z*).

In *The Att.-Gen.* v. *Brackenbury* (*a*), it was held that where the residuary legatees were the persons who would have been entitled in default of appointment, if the donee of the power had exercised it by charging in the first instance his residuary estate with his debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment and elect to take under the gift to them in the original instrument, so as to be chargeable only with a lower rate of duty.

legacy charged on land by the execution of a power created *by Will:*

In *The Att.-Gen.* v. *Pickard* (*b*), a testator devised real estates to William Trenchard for life, with remainder to his first and other sons in tail, with remainder to Thomas Pickard for life, remainder to his first and other sons in tail, remainder to George Pickard for life, with remainders over, and gave a power to the several persons who, by virtue of the limitations in the Will, should be in actual possession of the estates by deed or Will, to appoint to any woman or women they should marry, by way of jointure, rent-charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes, and deductions whatsoever: William Trenchard

(*x*) *Ante*, p. 1770. See also stat. 8 & 9 Vict. c. 76, s. 4, *ante*, pp. 1796, 1797.

(*y*) 3 Beav. 257.

(*z*) 10 Cl. & F. 257.

(*a*) 1 Hurlst. & C. 782.

(*b*) 3 Mees. & Wels. 552.

died without issue, and Thomas Pickard entered into possession of the estates, and by his Will, charged them with 750*l.* per annum by way of jointure to his wife under the power, and died without issue male: whereupon George Pickard entered into possession: And the Barons of the Exchequer held, that George Pickard was chargeable (under 45 Geo. III. c. 28, s. 5) (*c*), with Legacy duty after the rate of 10*l.* per cent. on the value of the rent-charge of 750*l.* per annum; their Lordships being of opinion, that the annuity in question, being a legacy, was charged upon the real estates by the Will which created the power to charge, in like manner as if the person, to whom it was given by the execution of the power, had been mentioned by name as the object of the testator's bounty in the Will which gave the power. And this decision was afterwards affirmed in the Exchequer Chamber (*d*).

This case was followed by that of *The Att.-Gen.* v. *Henniker* (*e*), in which it was held by the same Court to make no difference that by the husband's appointment of the annuity by way of jointure it was given to the wife on condition that she should relinquish her right to dower (*f*).

by the execution of a power created *by deed:*

In giving the judgment of the Court of Exchequer Chamber in the case of *The Att.-Gen.* v. *Pickard*, Lord Denman intimated his opinion, that charges of this nature would be exempt, if originally made by deed, under the proviso contained in stat. 45 Geo. III. c. 28, s. 4 (*g*). And this opinion was subsequently acted upon by the Court of Exchequer in *The Att.-Gen.* v. *Lord Hertford* (*h*). There A., by deed, dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to B., his son, for life, with remainders over: The deed contained a proviso, that it should be lawful for B., by his last Will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of 700*l.*, to be charged upon and pay-

(*c*) See *ante*, p. 1795.

(*d*) 6 Mees. & Wels. 438.

(*e*) 7 Exch. 331.

(*f*) See also accord.; *Sweeting* v. *Sweeting*, 1 Drew. 331. The Barons doubted whether, if this condition had been annexed by the original testator himself, the duty would have been payable on the whole annuity, or on the amount of it after deducting the value of the dower. But in *Sweeting* v. *Sweeting*, Kindersley, V.-C., was of opinion there is no ground for any such doubt.

(*g*) See *ante*, p. 1794.

(*h*) 14 Mees. & Wels. 284.

able out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects as B. should think fit: B., by his Will, by virtue of this power, appointed an annuity of 700*l.* a year to C. for her life, charged upon and payable out of the said land: And it was held by the Court of Exchequer, that Legacy duty was not payable in respect of such annuity.

By 8 & 9 Vict. c. 76, Legacy duty was made chargeable on every disposition by Will, under a power, of money payable out of real estate, whether the power was created by deed or Will.

This decision occasioned the passing of the stat. 8 & 9 Vict. c. 76 (*i*), which contains a wider definition of a legacy, and a narrower proviso, than those contained in the statute of 45 Geo. III. And Legacy duty has since become chargeable on every disposition by Will, under a power, of money which is payable out of real estate, or a charge thereon, whether the power was created by deed or Will: And it has also been held that the statute is retrospective, so that the duty is chargeable on money paid after the Act came into operation, notwithstanding the testator died before (*k*).

It will be seen that in the stat. 8 & 9 Vict. c. 76, the proviso at the end of the clause confines the exemption from duty to money which, by marriage settlement, is subjected to any limited power of appointment to or for the benefit of persons specially named or described therein as the objects of the power, or of their issue. And even this exemption has been practically repealed by the Succession Duty Act (*l*).

Duties on legacies, &c., out of, or charged on, real estate:

It has appeared (*m*), that legacies of every description of the value of 20*l.* or upwards (*n*), given out of or charged upon real or heritable estate (*o*), or out of any moneys to arise by sale,

(*i*) *Ante*, p. 1796. See Trevor on Taxes of Succession, p. 104, 105.

(*k*) *Att.-Gen.* v. *Lord Hertford*, 3 Exch. 670. As to the duties now payable on legacies charged on or payable out of realty, see *infra*, n. (*p*).

(*l*) See Trevor on Taxes of Succession, 187.

(*m*) *Ante*, pp. 1763, 1764.

(*n*) See as to the abolition of this exemption of legacies or residues or shares of residue under 20*l.*, sect. 42 of 44 & 45 Vict. c. 12, *ante*, p. 1763, note (*b*).

(*o*) No Legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of Election (*ante*, p. 1180 *et seq.*): But when the testator devises his own real estate to A., and bequeaths A.'s personal estate to B., the Legacy duty is payable on the value of the personal estate so charged on the testator's real estate: *Laurie* v. *Clutton*, 15 Beav. 131. Where, however, a testator died in 1811, having devised lands to his nieces as tenants in common in fee, with a proviso that if his nephew should transfer 10,000*l.*

mortgage, or other disposition of real or heritable estate, or any part thereof, and also the clear residue, when given to one person, and every share of the clear residue, (when given to two or more persons,) of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate *directed to be sold*, mortgaged, or otherwise disposed of, by any Will or testamentary instrument, where such residue or share shall amount to 20*l.* or upwards (*oo*), are subjected to the Stamp duties (*p*). With respect to the construction of this part of the statute of the 55 Geo. III. c. 184, the Court of Exchequer, in *Re Evans* (*q*), decided that where there is a bequest of real property to trustees and a discretion given to them to sell or not to sell, as they shall think best for the *cestuis que trust*, the duty does not attach, notwithstanding the trustees shall have exercised their discretion by an actual sale; for that a sale made under a *discretion* given to trustees to sell and distribute the proceeds, but without any positive direction imposing on them the obligation of selling, is not to be considered a sale *directed* by the testator, within the meaning of the statute. This case has been regarded by the Court of Exchequer as overruled by the cases of *The Att.-Gen.* v. *Mangles* (*r*), and *The Att.-Gen.* v. *Simcox* (*s*), and it was considered to be fully established that *if an actual sale* takes place, the proceeds are liable to duty, whether the sale is made by the trustees under an absolute direction given to the trustees to sell at all events, or under a direction given to them to sell in case they shall deem it expedient to do so (*t*).

land directed to be sold:

consols into the names of trustees for the benefit of the nieces, the lands should enure to the use of the nephew, and the nephew in the course of the following year having exercised his option, and transferred the consols, it was held in *The Att.-Gen.* v. *Wyndham*, 1 Hurl. & C. 571, that the defendant, the executor of the last surviving trustee, was liable to pay duty on the 10,000*l.* consols at the rate of 2½ per cent.; for that the money arose by a "disposition" of the testator's real estate, within the meaning of the stat. 48 Geo. III. c. 149, s. 2. See *ante*, p. 1796.

(*oo*) See note (*n*), previous page.

(*p*) See also stat. 45 Geo. III. c. 28, *ante*, p. 1794, and stat. 8 & 9 Vict. c. 76, s. 4, *ante*, p. 1796. But now by sect. 21 (2) of 51 & 52 Vict. c. 8, as to any person dying on or after 1st July, 1888, it is enacted that legacies payable out of or charged upon real estate or the proceeds thereof are not to be chargeable with Legacy duty but with Succession duty. See also *ante*, pp. 1764 and 1816.

(*q*) 2 Cr. M. & R. 206.

(*r*) 5 M. & W. 120.

(*s*) 1 Exch. 749.

(*t*) See 1 Exch. 765, 766, 768, *Att.-Gen.* v. *Metcalfe*, 6 Exch. 43, by Parke, B.

However, a contrary doctrine seems to have been maintained in the case of *The Adv.-Gen.* v. *Smith* (*u*), in the House of Lords, where Lord St. Leonards said he thought the case of *In re Evans* had been rightly decided, and he denied that it had ever been overruled. It has also been held, that if real estate is sold under the general power of the Court of Chancery to direct a sale for satisfying charges, no Legacy duty is payable, although the Will contains a discretionary power to trustees to sell (*x*).

Again, where the trustees have a discretion to sell or not to sell, *and they think fit not to sell*, the Legacy duty does not attach (*y*). And consequently, in every Will of this kind, where *no actual sale* takes place, a question of construction arises, viz., whether, taking the Will altogether, there is a *direction* to the trustees to convert the estate into money; or whether it is really left in their *discretion*, not to convert it into money, but to leave it as land. The words of discretion may be so controlled as to show that they are only in semblance words of discretion, and in reality words of direction (*z*); and if they are of the latter description, the Legacy duty will attach under the Act, notwithstanding the *cestui que trust* in fact takes the property in *statu quo*, and the trustees do not convert it into money by sale, according to the directions of the Will, there being no claim to render such sale necessary (*a*).

If a testator devises real estate to trustees with directions to sell it, and invest the money arising from such sale in the purchase of other real estate, no duty is payable, though the estate be sold, and the proceeds paid to the person entitled to the estate to be bought (*b*).

Tolls.

It was held by Lord Cottenham in *The Att.-Gen.* v. *Jones* (*c*), that the profits arising from the tolls of a lighthouse are real estate, and not subject to Legacy duty.

(*u*) 1 Macq. H. of L. 760.

(*x*) *Hobson* v. *Neale*, 8 Exch. 368; 17 Beav. 178. *Secus*, where the sale is ordered by the Court, in consequence of the directions in testator's Will: *Harding* v. *Harding*, 2 Giff. 597.

(*y*) *Att.-Gen.* v. *Mangles*, 5 M. & W. 120.

(*z*) *Adv.-Gen.* v. *Ramsay's Trustees*, 2 Cr. M. & R. 224, note (*a*).

(*a*) *Att.-Gen.* v. *Holford*, 1 Price, 426; *Williamson* v. *Adv.-Gen.*, 10 Cl. & F. 1 accord.

(*b*) *Mules* v. *Jennings*, 8 Exch. 830; *Heal* v. *Knight*, 8 Exch. 839, note (*a*).

(*c*) 1 Mac. & G. 574.

These and similar questions have obviously lost their importance since the Succession Duty Act has taxed all real estate equally with personalty.

Duty on a bequest of rent-charge, annuity, &c., &c.

In *The Att.-Gen.* v. *Jackson* (*d*), the testator, Samuel Jackson, gave a life estate in his freehold property to Charlotte Troughton, and after her death, and in the event of her husband, Joseph Troughton, surviving her, he gave him "one annuity or yearly rent-charge" of 500*l.* a year, payable quarterly, out of his real estate, with a landlord's power of distress and entry, and subject to that annuity, he gave his real estate in moieties to Randle Jackson and William Jackson, Randle Jackson having an estate in fee, and William Jackson an estate for life: The question was whether the annuity of 500*l.* a year, thus given to Joseph Troughton, was to be considered a legacy within the meaning of the Acts of Parliament imposing duties on legacies: It was contended, on behalf of the defendants, that the subject-matter was in fact real property; that it was a rent-charge, *i.e.*, a freehold interest in the party in whose favour it was granted; that it was as much so, as far as related to the 500*l.* per annum, as the estate out of which it issued; and that it was not the intention of the Legislature, in imposing the Legacy duties, to impose any duty whatever upon real property: But the Court of Exchequer held, that the annuity in question fell precisely within the terms made use of by the Legislature in the stat. 55 Geo. III. c. 184, with respect to gift by way of annuity, viz. "all gifts of annuities, or by way of annuity, or of any partial interest or benefit, out of any such estate or effects as aforesaid" (*e*), and was therefore liable to the duty (*f*).

But in *Shirley* v. *Lord Ferrers* (*g*), a testator devised certain estates to the use of trustees for the term of 500 years, and subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of C. S. (then an infant), with divers remainders over, and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estate as they should think fit (not exceeding in any one year a certain

(*d*) 2 Crompt. & Jerv. 101.

(*e*) *Ante*, p. 1766.

(*f*) See also *Stow* v. *Davenport*, 5 B. & Adol. 359; 2 Nev & M. 805, in which case the Court of King's Bench recognised and acted on this decision; *Re Trenchard*, W. N. (1904), p. 195.

(*g*) 1 Phil. Ch. C. 167.

amount), in aid of another fund, to the maintenance and education of C. S., until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of C. S. when she should attain twenty-one or marry, and if she died under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should during her lifetime, pay the surplus rents, after paying the annuities, to her for her separate use: It was contended, on behalf of the Crown, that the trust for maintenance amounted to "a gift by way of annuity," or "to a partial interest or benefit:" But it was held, by Lord Lyndhurst, that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of C. S. until her marriage, were not liable to Legacy duty (*h*): And his Lordship expressed his opinion, that nothing but what is a charge upon the estate of another person is within the Act (*i*).

Duty on legacies to be laid out in land.

Legacies of personal estate to be laid out in land were within the scope of the Acts, prior to the statute 36 Geo. III. c. 51, imposing a Stamp duty on receipts (*k*): And there is no reason for excepting this class of legacies from the operation of the retrospective schedules (*l*).

Duty on a legacy consisting of forgiveness of a debt.

It was held in the case of *Izon* v. *Butler* (*m*) that a bequest by the obligee of a bond to the obligor in these terms, "I remit and forgive to Thomas Whithurst the sum of 500*l.* which he stands indebted to me on his bond, and I direct the said bond to be delivered up to him and cancelled," was merely a personal legacy, and subject to the incidents affecting legacies. And accordingly, in *The Att.-Gen.* v. *Holbrook* (*n*), the obligee of a bond, after the death of one James Willis, the principal therein, but during the life of the surety, who was the testator's brother, made his Will, containing the following directions relative to the bond: "I hereby forgive the bond debt, both

(*h*) Succession duty would now, however, be chargeable under such circumstances by virtue of 16 & 17 Vict. c. 51.

(*i*) See *Swabey* v. *Swabey*, 15 Sim. 502, as to money belonging to the testator, and charged on his own real estate, continuing a charge so as to be subject to Legacy duty.

(*k*) *Re De Lancey*, L. R. 4 Ex. 345. See *ante*, p. 1768. As to liability to Succession duty, see sect. 30 of 16 & 17 Vict. c. 51, *ante*, p. 1817.

(*l*) *Att.-Gen.* v. *Hancock*, 2 Mees. & W. 563.

(*m*) 2 Price, 34.

(*n*) 3 Y. & J. 114; *S. C.*, 12 Price, 407.

principal and interest, due to me and entered into by James Willis and my brother James Holbrook with and for him, for the said James Willis's paying me the principal sum of 4,000*l.* and interests, &c., &c., and do order the said bond, at my decease, to be delivered up and cancelled": The interest upon the bond was paid up to the death of the testator, whom his brother, James Holbrook, survived: And it was holden that this was a legacy, whereon Legacy duty was payable by James Holbrook.

Whether duty payable on a bequest to creditors.

In *Foster* v. *Ley* (*o*), where a testatrix bequeathed property in trust to pay off the debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged, the Court of Common Pleas held, that the creditors ought to pay the Legacy duty on their several debts. But in *Williamson* v. *Naylor* (*p*), where a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors, named in a schedule to his Will, and the schedule contained both the names of the creditors and the debts due to them respectively, the remedy for the recovery of which was barred by the Statute of Limitations; it was held by Lord Lyndhurst, C. B., and afterwards by Alderson, B., that the parties so named in the schedule were not to be considered as legatees but as creditors; for that the bequest was not a legacy subject to the payment of Legacy duty, but a trust created by the testator in satisfaction or reduction of debts, the remedy for the recovery of which was barred by the statute (*q*). Nevertheless, in *Turner* v. *Martin* (*r*), where a testator who was a certificated bankrupt, directed his executors to pay in full all his creditors who had proved, it was held by Lord Cranworth, C., that the Legacy duty was payable on the amount which the testator had directed to be paid to the official assignee for that purpose: for that the testator must be regarded as having conferred a mere bounty on the creditors.

Duty on a legacy given to a charity.

In a case before Shadwell, V.-C., *Re Franklin's Charity* (*s*), Joseph Franklin bequeathed to the poor of the parish of Had-

(*o*) 2 Bingh. N. C. 269. See *O'Connor* v. *Haslam*, 5 H. L. C. 170, 174; *S. C.*, cited *sub nomine Richards* v. *Foster*.

(*p*) 3 Y. & C. 208; *ante*, p. 956.

(*q*) See also *Phillips* v. *Phillips*, 3 Hare, 290.

(*r*) 7 De G. M. & G. 429. See also *Re Sowerby's Trusts*, 2 Kay & J. 630.

(*s*) 3 Younge & Jerv. 544; *S. C.*, 3 Sim. 147.

denham 50*l.* per annum for ever, to be laid out in bread at Christmas, and distributed by the minister and churchwardens to the most needy objects in the parish: And the testator charged all his leasehold and personal property with this, amongst other legacies: And his Honour held, that this was a legacy on which duty ought to be paid; on the ground that, although it was not expressed to be given to any individual, yet, in effect, it was given in such a manner, as that the executor held it in trust for certain purposes: And his Honour, in giving his judgment, observed, that where legacies have been given to treasurers of hospitals, and other charitable institutions, it has been considered as a matter of course to pay the duty.

But in *Re Wilkinson* (*t*), the Barons of the Exchequer held, that executors cannot be called upon to pay Legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest "among poor pious persons, male or female, old or infirm, in ten or fifteen pounds, as they see fit, not omitting large and sick families, if of good character" (*u*). This judgment, which was afterwards affirmed in the Exchequer Chamber (*x*), has been regarded, in effect, as having overruled the above decision of the Vice-Chancellor: And it has been observed, that sect. 11 of the statute 36 Geo. III. c. 52 (*y*), on which much stress was laid by the Barons, and the Judges in error, does not appear to have been brought under his Honour's notice, in the argument of the case before him.

However, in *The Attorney-General* v. *Fitzgerald* (*z*), where the testator gave his residuary estate (which amounted to 13,000*l.*) to his executors to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick; the same learned Judge held that Legacy duty was

(*t*) 1 Cr. Mees. & Rosc. 142; *S. C.*, 4 Tyrwh. 514.

(*u*) If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, it was held that Legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for, and bound to retain the duty chargeable on such amount: *Re Wilkinson*, 1 Cr. Mees. & Rosc. 142. And now, by virtue of sect. 42 of 44 & 45 Vict. s. 12, *ante*, p. 1763, note (*b*), the duty would, it would seem, attach to any bounty received by any of such objects, in a similar case.

(*x*) *Att.-Gen.* v. *Nash*, 1 Mees. & Wels. 237.

(*y*) See *ante*, p. 1773.

(*z*) 13 Sim. 83.

payable on the residue. And his Honour said, that there was a material distinction between the case of *Re Franklin's Charity* and the case of *Re Wilkinson:* That in the former there was a gift of a perpetual annuity of 50*l.* to be disposed of in charity; in the latter, the Judges seem to have considered that there was a gift of a sum in gross, which was at once to be disposed of by the executors, apparently, as if it was not a charity: But that this of itself furnished a material difference between the two cases; because, if the bequest was to be considered as a charitable bequest in its origin, then the Court of Chancery must, of necessity, have a dominion over the subject of the bequest, and would, from time to time, determine in what manner the property should be enjoyed; and long before any person participated, the legacy must be paid: And his Honour added, that he much doubted whether either portion of the 11th section of 36 Geo. III. c. 52, applies to a case, where the whole subject of the bequest must be taken *in solido*, at once, for the purpose of being applied in perpetuity, in some manner that may be such that no one individual will ever participate in the subject itself, but will have a benefit which results from the application of a large sum of money in some given manner, not consisting in the payment of money: The learned Judge proceeded to express his opinion, that the legacy in question was liable to duty in the same manner as if it had been given to the trustees for an existing school for the purposes specified. This view of the subject was recognized and acted upon by Parke, B., in a similar case, on a subsequent occasion, of *Re Griffiths* (*a*), and the learned Baron expressed his concurrence in this opinion of V.-C. Shadwell. And in two subsequent cases (*b*), Romilly, M. R., declined to follow the case of *Re Wilkinson*, and said he believed that decision had been afterwards disapproved of by the Court which decided it. Again, in a later case (*c*), the Court of Exchequer held, that a bequest of money for the purpose of building a church and parsonage house, and of endowing and repairing the church, was subject to Legacy duty of 10*l.* per cent. (*d*).

In cases within the operation of the Succession Duty Act, all

(*a*) 14 M. & W. 510.

(*b*) *Re Pearce*, 24 Beav. 491; *Harris* v. *Earl Howe*, 29 Beav. 261.

(*c*) *Re Parker*, 4 H. & N. 666.

(*d*) The Barons were of opinion that at all events the duty was payable under the 16th section of the Succession Duty Act.

questions of this kind will be disposed of by the 16th section of that statute (*e*).

39 Geo. III. c. 73. No legacy of books bequeathed to any body corporate, &c., to be preserved shall be liable to any duty.

The stat. 39 Geo. III. c. 73, after reciting that "it is expedient that certain specific legacies given to bodies corporate, or other public bodies and societies, should be exempted from the duties imposed on legacies," proceeds to enact, "that no legacy consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the Society of Serjeants' Inn, or any of the Inns of Court or Chancery, or any endowed school in order to be kept and preserved by such body corporate, society, or school, and not for the purposes of sale, shall be liable to any duty imposed on legacies by any law now in force" (*f*).

Duty on legacies of property in this country belonging to a foreigner.

It has been long established that property in this country, belonging to a foreigner who dies domiciled abroad, and appoints an English executor, and bequeaths to English legatees, is not liable to Legacy duty (*g*).

Duty on legacies of property situate out of Great Britain.

If the testator was a British subject domiciled in Great Britain, all his personal property, in whatever part of the world it may be situate, is considered as English personal estate, and is liable to the duties imposed by the statutes on legacies and successions: For the rule is that personal property follows the person, and is not in any way to be regulated by the *situs* (*h*): Thus, in *Re Ewin* (*i*), it was held by the Court of Exchequer, that American, Austrian, French and Russian stock, the property of a testator domiciled in England, was liable to Legacy duty.

Legacy Acts co-extensive with the limits of this kingdom only:

But it is clear that the legacy Acts are co-extensive with the limits of this kingdom, and this kingdom only, and do not extend to the territorial possessions of the Crown in the colonies (*k*). Hence, where persons die domiciled in India, whose

(*e*) *Ante*, p. 1810.

(*f*) Cf. with this section sect. 15 of the Finance Act, 1894, empowering the Treasury to remit Estate duty *or any other* death duty leviable in similar cases.

(*g*) *Re Bruce*, 2 Cr. & J. 436; *S. C.*, 2 Tyrwh. 475.

(*h*) See *ante*, p. 1256 *et seq.*, and p. 1713.

(*i*) 1 Cr. & J. 151; and see *post*, p. 1850.

(*k*) 1 Cr. & J. 153; 1 Tyrwh. 103, by Alexander, L. C. B.; 1 Cr. & J. 158; 1 Tyrwh. 107, by Bayley, B.

estates, though the estates of British subjects, are distributed in India, they are not chargeable with any Legacy duty (*l*). Hence, also, if a testator die domiciled in India, and his personal estate be wholly in India, and his executor be resident there, and the executor remit to a legatee in England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, it has uniformly been held that no Legacy duty is payable on such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is considered as established there (*m*). Accordingly, in *Hay* v. *Fairlie* (*n*), a testator, resident in India, bequeathed to an infant a sum of money to be invested in the Company's securities, of which the interest was to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children: He was lost on his voyage to England, leaving all his property in India: His executors, resident in that country, proved his Will at Calcutta, invested the legacy in the Company's securities, and for several years remitted the interest to their correspondents in London, for the benefit of the legatee, who had come to England: A part of that interest was brought into Court in a suit established by her for the appointment of a guardian and for the allowance of maintenance, and an order was made for the payment to her guardian, out of the fund so created, of 200*l.* a year, as maintenance: And Lord Gifford, M. R., held, that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a-year was not liable to the Legacy duty. So, in *Logan* v. *Fairlie* (*o*), a testator resident in India, and having all his property there, bequeathed his residuary personal estate to his brother, J. H., and his sister, H. L., in equal shares; but in case his sister should die before him, then to her children: The executor, who was also resident in India, having proved the Will there, remitted the residue to his agent in England, with a letter in which he desired the agent to appropriate the fund according to the annexed extract of the Will, by which it would be perceived that half went to J. H. and half to H. L. or her children: H. L. had died in the lifetime of the testator, leaving nine infant children: A suit was instituted in England

estates distributed elsewhere not chargeable with duty:

even though remitted to England.

(*l*) By Alexander, L. C. B.; 1 Cr. & J. 153; 1 Tyrwh. 103.

(*m*) By Sir J. Leach, V.-C., in *Logan* v. *Fairlie*, 2 Sim. & Stu. 291.

(*n*) 1 Russ. Chanc. Cas. 117.

(*o*) 1 Myl. & Cr. 59.

by the children against the agent, and also against the executor and J. H., who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured: And it was held, by the Lords Commissioners Pepys and Bosanquet, that no Legacy duty was payable upon such moiety, inasmuch as it had been appropriated in India.

The rule was once supposed to be different, where, although the testator was domiciled abroad, the assets came to be administered in England: Thus, in *The Att.-Gen.* v. *Cockerell* (*p*), the Barons of the Exchequer held, that legacies bequeathed by a British subject resident in the East Indies, out of his personal estate, to persons living in England are liable to the duty, if the executor proves the Will in England, and pays the legacies here, notwithstanding the testator realised and possessed his property in India, resided there, made his Will there, and died there; and although the executors were in India at the time of their appointment, and the Will was originally proved there. So in *The Att.-Gen.* v. *Beatson* (*q*), it was held by the Court of Exchequer, that the Legacy duty is payable on bequests of personal property in India, by a Will there, and administration granted under it there, if it be remitted to England, and applied by another administrator in Scotland, under administration granted in England. Again, in *Logan* v. *Fairlie* (*r*), Sir John Leach, V.-C., expressed his opinion that if a part of the assets of a testator, who at his death was resident in India, and had all his property there, is found in England, in the hands of the agent of his executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy, out of such unappropriated assets, then such assets are to be considered as administered in England, and the Legacy duty is payable in respect of them.

But modern decisions appear to have overruled this distinction: and it must be regarded as now fully established that the personal assets situate in India, of a testator who resides and makes his Will, and dies in India are not subject to Legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the Will in India, to executors who have proved the Will in England, and are administered under a decree of the Court of Chancery here.

(*p*) 1 Price, 165. (*q*) 7 Price, 560.
(*r*) 2 Sim. & Stu. 284.

Thus, in *Jackson* v. *Forbes* (*s*), a testator born in Scotland, who resided and died in India, having real and personal property there situate, but no assets in England, by his Will and testamentary papers, left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities: His executors obtained an Indian probate, and paid the debts and bequests, and converted the principal part of the estate into money which they sent to their bankers in England, and invested it in the funds in their own names: Proceedings were commenced in England against the executors, to determine the claims under the Will; whereupon the stock was transferred into the name of the Accountant-General of the Court of Chancery, and the Court made a decree ascertaining the shares of the several claimants: And the Barons of the Exchequer held that the Legacy duty was not payable on legacies or shares of the residue bequeathed. And this decision was affirmed in the House of Lords (*t*). Again, in *Arnold* v. *Arnold* (*u*), a man possessed of personal estates, situate partly in England, but principally in the East Indies, where he was employed in the service of the East India Company, made his Will in the East Indies, and died there: After specifically bequeathing his property in England to his wife, his Will gave considerable pecuniary legacies to his infant children, and to various other persons, some of whom were native inhabitants of India. One of the executors lived in Calcutta, and proved the Will there, and having collected the Indian assets, and thereout paid the testator's Indian debts and funeral expenses, he remitted the surplus to England to the other executors, by whom probate of the Will, in respect of the property in England, had been already obtained in this country: In a suit instituted in this Court by the testator's children against the executors, for the administration of the estate, the fund so remitted was transferred into Court, and having proved insufficient to pay the pecuniary legacies in full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies: And Lord Cottenham held, that the Legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees: His Lordship considered the

(*s*) 2 Cr. & J. 382.

(*t*) *Att.-Gen.* v. *Jackson*, 8 Bligh, 15; *S. C., nomine Att.-Gen.* v. *Forbes*, 2 Cl. & F. 48.

(*u*) 2 Myln. & Cr. 256.

decision by the House of Lords in *The Att.-Gen.* v. *Jackson* as precisely in point, and conclusive of the case before him: But the learned Judge also stated, that independently of that authority, he should upon the construction of the Act (36 Geo. III. c. 52 (*x*)), have been of opinion that the legacies in question were not legacies given by the Will of a person intended by the Act: for when the Act speaks of "any Will of any person" and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and Wills, and personal estates in this country: that being the limit of the sphere of the enactment (*y*).

If the deceased, whether a British born subject or a foreigner, died domiciled here, all the assets, wherever situate, are liable to the duty: if he died domiciled abroad, all are exempt.

It may be observed that there were still several questions connected with these authorities, which could not be regarded as precisely settled by them. Thus, it was undecided, whether property situate abroad, or in this country, belonging to an alien who is domiciled here, is liable to the duty: or whether property, situate in this country, belonging to a British subject who dies domiciled in the British colonies, or domiciled in a foreign country (*z*), is so liable. In a former Edition of this Work, Sir Edward Vaughan Williams suggested that the principle ought to be applied to these cases (as it appears to have been in the decision of the case of *Re Ewin*) (*a*), that personal property follows the person and is to be considered as situate wherever the domicil of the proprietor is (*b*); and consequently, that if the deceased, whether a British subject or a foreigner, died domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable: But if he died domiciled out of England, then the whole of his personal property, wherever it happened to be at the time of his death, is to be regarded as situate in the country of domicil, and

(*x*) See *ante*, p. 1768 *et seq.*

(*y*) The decision in this case must not be understood as at all qualifying the decision of the Court of Exchequer: *Re Ewin*, 1 Cr. & J. 151, *ante*, p. 1846. On the contrary, it was decided by the Barons of the Court (*Re Coales*, 7 M. & W. 390) that if a British born subject, domiciled in England, dies here and makes the Will here, leaving assets in India, which are administered by his executor here, they are subject to Legacy duty, notwithstanding they were received in India and remitted to the executor here by an administrator *cum testamento annexo* appointed under an Indian grant of administration.

(*z*) See *Att.-Gen.* v. *Dunn*, 6 Mees. & W. 511.

(*a*) 1 Cr. & J. 151, *ante*, p. 1846.

(*b*) See *ante*, p. 1256 *et seq.*

therefore exempt. This suggestion has been fully justified by the subsequent decision of the House of Lords in the case of *Thompson* v. *The Adv.-Gen.* (*c*): There a British-born subject died domiciled in a British colony: At the time of his death he was possessed of personal property locally situate in Scotland: Probate of his Will was taken out in Scotland, for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in Scotland: And it was held, on the principle above mentioned, that Legacy duty was not payable in respect of these legacies. In the course of the discussion of this case, the following question was put by the House to the Judges: viz., "A., a British-born subject, born in England, resided in a British colony: He made his Will, and died domiciled there: At the time of his death, he had debts owing to him in England: His executors in England collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of Legacy duty?" The Judges were unanimously of opinion in the negative. And the House decided accordingly.——This case was afterwards regarded by the Court of Exchequer in *The Att.-Gen.* v. *Napier* (*d*) as having definitely settled the principle above stated; and the Barons decided accordingly a converse case; viz., that where the intestate was domiciled in England and the property abroad, it was liable to the duty.

So as to Succession duty.

Accordingly it has been held that Succession duty is not payable on legacies given by the Will of a person domiciled in a foreign country (*e*).

The rule applies to legacies given in exercise of powers by testator domiciled out of England:

The same principle applies to cases, where legacies are given in exercise of powers—for though in such cases the rule that the property follows the person can hardly be applied, yet the statute (36 Geo. III. c. 52, s. 7), having put into one class legacies

(*c*) 12 Cl. & F. 1; *S. C.*, 13 Sim. 153. See also *Commissioners of Charitable Donations* v. *Devereux*, 13 Sim. 14; *Chatfield* v. *Berchtoldt*, L. R. 12 Eq. 464; L. R. 7 Ch. 192. See as to a share of real estate situate abroad, being partnership property belonging to a testator who dies domiciled in England: *Forbes* v. *Stevens*, L. R. 10 Eq. 178.

(*d*) 6 Exch. 217, 220.

(*e*) *Wallace* v. *Att.-Gen.*, L. R. 1 Ch. 1. See also *Att.-Gen.* v. *Campbell*, L. R. 5 H. L. 524, and compare *Re Capdevielle*, 2 H. & C. 985; *Att.-Gen.* v. *Blucher de Wahlstatt*, 3 H. & C. 374; *Re Badart's Trusts*, L. R. 10 Eq. 288. And see *ante*, p. 1798, n. (*c*).

given by testators out of personal estate, or out of any personal estate they may have had power to dispose of, could not have intended that a different rule should apply to different members of the class, and that duty should be payable by the appointees under the Wills of donees of powers domiciled out of Great Britain, when no duty would be payable by legatees under the Wills of those persons to be paid out of their personal estates (*f*). But the rule is different as to Succession duty on testamentary appointments under English instruments (*g*).

but not to Succession duty.

This difference is well illustrated by the two cases of *The Att.-Gen.* v. *Campbell* (*h*) and *Lyall* v. *Lyall* (*i*). In *The Att.-Gen.* v. *Campbell*, A. was domiciled in Portugal, but on a visit to England made his Will in English form and appointed executors, some of whom resided in England. He desired his executors to collect his property, which was in Portugal, to convert it into cash, pay certain legacies and invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of 50*l.* to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died the part appropriated to satisfy her annuity became divisible among the children: And it was held that this constituted a succession within the meaning of the second section of the Succession Duty Act, and was liable to the payment of Succession duty. The general rule is stated to be that: Where personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to Legacy or Succession duty on being paid to the legatee. But where the executor directed to collect foreign property and invest it here, has discharged the duty imposed on him and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may (like the testator) be domiciled abroad.

The case of *Lyall* v. *Lyall* was as follows: By a marriage settlement executed in England, the husband assigned to trustees

(*f*) *Re Wallop's Trusts*, 1 De G. J. & S. 656.

(*g*) *Ibid.* See also *Re Lovelace*, 4 De G. & J. 310; and *Att.-Gen.* v. *Jewish Colonization Association*, [1900] 2 Q. B. 556; [1901] 1 Q. B. 123, *ante*, p. 1713.

(*h*) L. R. 11 Eq. 378; L. R. 5 H. L. 524.

(*i*) L. R. 15 Eq. 1.

(all domiciled and resident in England) an English policy of assurance, effected on his own life for 2,000*l.*, payable at the expiration of six months after his death, and a sum of consols, and covenanted to pay to the trustees within three years the sum of 1,000*l.*; and it was declared that the policy moneys and the 1,000*l.* should be held upon trust for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, the plaintiff, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the 1,000*l.* covenanted to be paid to the trustees had been paid to them: And it was held, on the authority of *The Att.-Gen.* v. *Campbell*, that Succession duty was payable by the plaintiff on the funds to which he became entitled under the settlement. By his Will the husband appointed trustees and executors in New South Wales to collect his residuary estate (which was all locally situate in that country), and transmit the same to trustees and executors in England who were to invest the funds so transmitted in England and pay the income to his wife for life, and after her death to divide the same among the children. At the time of his wife's death no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them: And it was held that no Succession duty was payable by the plaintiff on the funds to which he became entitled under the Will.

SECTION V.

By Whom the Duties are Payable.

Duties payable by executor or administrator unless otherwise provided for.

It will be observed, by referring to the statute 36 Geo. III. c. 52, s. 6, that the duties, in all cases wherein it is not otherwise thereby provided for, must be paid by the executor or administrator, upon retainer for his own benefit, or for the benefit of any other persons, of any legacy or part of any legacy, or of the residue or any part of such residue, which he shall be entitled so to retain; and also upon delivery, payment, or discharge of any legacy or residue, &c., to which any other person

Legacy duty to be deducted by executor or administrator.

shall be entitled (*k*). It is the duty of the executors to deduct the Legacy duty when they pay the legacy, and if they do not do so, they are made personally responsible (*l*).

By the statute 45 Geo. III. c. 28, s. 5 (*m*), it is provided, that the duties imposed on legacies charged upon, or made payable out of real estate, &c., shall be paid by the trustee or other person entitled to the real estate which is subject to the legacy, and that the duty shall be retained by the person paying such legacy, in like manner as is provided, respecting legacies out of personal estate, by the statute 36 Geo. III. c. 52 (*n*). In the case of *The Att.-Gen.* v. *Jackson*, before stated (*o*), the land out of which the legacy was payable had been devised to two persons in moieties; the one moiety to the one for life, and the other moiety to the other in fee: And the Court of Exchequer held, that both the parties, the tenant for life of the one moiety, and the tenant in fee of the other, were liable to the Crown for the payment of the Legacy duty.

The collection of the Succession duty is provided for by the 44th and five following sections of the statute 16 & 17 Vict. c. 51, by which that duty is imposed (*p*). And it will be observed, that by the interpretation clause (*q*), the term "trustee" is to include an executor or administrator.

It was decided in *Hales* v. *Freeman* (*r*), upon the construction of the Legacy Duty Acts, that a trustee under a Will, who had paid the Legacy duty upon an annuity, charged on land, after the expiration of four years from the death of the testator, might recover the amount of duty so paid from the legatee, notwithstanding a previous assignment of the annuity by such legatee (*s*).

(*k*) See *ante*, p. 1768.

(*l*) *Per* Parke, B., in *Re Sammon*, 3 Mees. & W. 386. There is a plain distinction between Legacy duty and Succession duty in this respect—the Legacy Duty Act provides that the executors shall be liable to see to the payment of the duty; the Succession Duty Act does not contain a similar provision applicable to sums which an executor has to pay under a covenant: *per* Lindley, L. J., in *Re Higgins*, 31 C. D. 142, 146. As to limitation of an executor's liability by lapse of time, see *post*, p. 1862, and see *ante*, p. 1768, note (*m*).

(*m*) See *ante*, p. 1795.

(*n*) See *ante*, p. 1768 *et seq.*

(*o*) See *ante*, p. 1841.

(*p*) See *ante*, p. 1823 *et seq.*

(*q*) See *ante*, p. 1799.

(*r*) 1 Brod. & Bing. 391; *S. C.*, 4 Moo. 21.

(*s*) This case was recognized and acted on in *Stow* v. *Davenport*, 5 B. & Adol. 366; *Bate* v. *Payne*, 3 Q. B. 900. A purchaser from

But a question may arise, whether the legacies are not, by the terms of the Will, to be paid in full, free of the Legacy duty, so as to make it incumbent on the executor to retain the duty out of the residue, instead of deducting it from the payment to the legatee (*t*).

In *Barksdale* v. *Gilliat* (*u*), the testator directed all the legacies to be paid at the expiration of six months after his decease *without any deduction:* And Lord Eldon held, that the legatees were entitled to the full amount, and that the Legacy duty must be paid by the executors. So in *Smith* v. *Anderson* (*x*), the testator gave certain annuities, and directed them to be paid *without any deduction whatsoever:* And Sir John Leach, M. R., held, that the annuities should be paid clear of Legacy duty, on the ground that, from the nature of the property out of which the annuities were to be paid, there could be no deduction, except in respect of the Legacy duty: His Honour, in giving judgment, said, that he admitted that it was to be stated as the fair result of Lord Eldon's judgment in the above case of *Barksdale* v. *Gilliat*, that his Lordship considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the Legacy duty, if, from the nature of the

a legatee is not necessarily subject to the same liability as the legatee himself in this respect: *Farwell* v. *Seale*, 3 De G. & Sm. 359.

(*t*) In such cases, no duty shall be chargeable on the money to be applied to the payment of the duty: see stat. 36 Geo. III. c. 52, s. 21, *ante*, p. 1779. A direction in a Will, "I direct all the legacies left by my Will and codicil to be paid free of Legacy duty," will not free property liable to Succession duty from that duty: *Re Johnston*, 26 C. D. 538, 554, in which case it was held that the Legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only. See also *Ansley* v. *Cotton*, 16 L. J. Ch. 55, where it was held that the general term "legacy" will include a gift of stock, and *Douglas* v. *Congreve*, 1 Keen, 410, where it was held that the term "pecuniary legacy" will not have that effect, although it will include the forgiveness of a debt: *Morris* v. *Livie*, 11 L. J. Ch. 172. Where a particular legacy is directed to be paid free of Legacy duty, and the estate is insufficient to pay all the legacies, the Legacy duty on the sum to be actually received by the legatee must be paid by the executor before apportioning the fund available for the payment of the legacies rateably amongst the legatees: *Re Wilkins*, 27 C. D. 703; *Heath* v. *Nugent*, 29 Beav. 226.

(*u*) 1 Swanst. 562.

(*x*) 4 Russ. Chanc. Cas. 352.

property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The correctness, however, of this view of Lord Eldon's judgment was denied by Lord Brougham in *Louch* v. *Peters* (*y*), and by Alderson, B., in *Gude* v. *Mumford* (*z*).

In *Dawkins* v. *Tatham* (*a*), an annuity was given by a Will *clear of all deductions*, and was directed to be paid out of certain sums of stock standing in the testator's name: and Sir L. Shadwell, V.-C., held that the executors were bound to pay the legacy, free from the legacy tax.

In *Stow* v. *Davenport* (*b*), lands were devised to the use among others, that M. A. F. should take, from and out of the same premises, an annuity or yearly charge of 500*l.* a year, to be paid *clear of all taxes and deductions*, remainder to S. for life, subject to the annuity: And the Court of King's Bench held, that the annuity was to be paid clear of Legacy duty, and was a charge upon the land; and consequently, that S., who had entered into possession under the devise to him, and been compelled to pay the Legacy duty on the annuity, pursuant to 45 Geo. III. c. 28, s. 5, could not recover it again from the annuitant (*c*).

(*y*) 1 M. & K. 489.

(*z*) 2 Y. & C. 448.

(*a*) 2 Sim. 492. It must be observed, that in the case already mentioned of *Hales* v. *Freeman*, 1 Brod. & Bingh. 391, the Court of C. P. held that a legatee, to whom an annuity was given "clear of all deduction," was compellable to refund the amount of the duty: But the point which might have been raised upon the construction of these words does not appear to have been noticed by either the bar or the bench; and the argument and decision proceeded on a totally distinct ground.

(*b*) 5 B. & Adol. 359; *S. C.*, Nev. & M. 805.

(*c*) Whether or not an annuity is to be free from any deduction for income tax must depend upon the meaning of the words used by the testator, that is, upon the meaning with which he uses the word "deduction." *Primâ facie* the word "deduction" does not include income tax, because income tax is not a deduction, but a payment—to be made by the recipient of the legacy; and there must be something else besides the word "deduction" to make the gift of an annuity free of income tax. In the cases of *Festing* v. *Taylor*, 3 B. & S. 217; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 62; *Turner* v. *Mullineux*, 1 J. & H. 334; *Re Bannerman's Estate*, 21 C. D. 105, the Court found sufficient to construe the Will in the wider sense. In the cases of *Wall* v. *Wall*, 15 Sim. 513; *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Abadam* v. *Abadam*, 33 Beav. 475; *Sadler* v. *Rickards*, 4 K. & J. 302; *Peareth* v. *Marriott*, 22 C. D. 182; *Gleadow* v. *Leetham*, 22 C. D. 269, the Court was unable to admit such construction.

Again, in *Louch* v. *Peters* (*d*), a testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half-yearly, out of real estate, *clear of all taxes and outgoings:* And it was held, by Sir J. Leach, M. R., and afterwards by Lord Brougham on appeal, that the annuitant took it clear of the Legacy duty.

Further, in *Courtoy* v. *Vincent* (*e*), a testator directed his executors and trustees to pay certain annuities and legacies *clear* of the property tax, and *all expenses attending the same:* And it was held by Sir T. Plumer, M. R., that the Legacy duty ought to be paid out of the assets of the testator, and that the annuitants and legatees were entitled to receive the full amount of their respective legacies and annuities, without any deductions in respect of Legacy duty.

So in *Godsden* v. *Dotterill* (*f*), a testator bequeathed to his sister a legacy of 100*l.*, to be paid to her *free from all expense;* and it was held by Sir J. Leach, M. R., that this legacy was to be paid discharged of duty.

Again, in *Gude* v. *Mumford* (*g*), a testator devised to James Metherell, for his life, "one annuity or *clear* yearly sum of 100*l.*," and charged his estates at Chobham with the payment of "the said annuity or yearly sum of 100*l.*:" He then devised the estates at Chobham to trustees, in trust to levy and raise the annuity, and pay the same to James Metherell; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee: And Alderson, B., held that James Metherell was entitled to the annuity clear of all deductions for Legacy duty, and that the residuary estate was chargeable with the duty payable thereon: The learned Baron observed, that it was clear, from the authorities on the subject, that if, from any directions contained in the Will, an intention on the part of the testator can be collected that the Legacy duty should be paid by the executor, the Court will carry that direction into effect: And the learned Judge denied that the view taken by Sir J. Leach (*h*), of Lord Eldon's judgment in *Barksdale* v. *Gilliat*, was correct; but declared his opinion, that the right construction of it was, that Lord Eldon considered the words "without deduction" to mean, in their ordinary sense, "clear of all

(*d*) 1 M. & K. 489. (*e*) 1 Turn. & Russ. 433. (*f*) 1 M. & K. 56.
(*g*) 2 Y. & Coll. 448. (*h*) See *ante*, p. 1855.

deduction," and then went on to examine, whether, in the four corners of the Will, he could find the same words used, in another sense, or in a more definite and limited sense; and whether, if he could find an intention to use them in a limited sense, he could carry that intention into effect; and upon the whole he arrived at the conclusion that the words must be used in their ordinary sense without qualification (*i*).

But in *Foster* v. *Ley* (*k*), where a testatrix bequeathed property in trust "to pay off the debts of her first husband, as it was her will that the same should be discharged," and the moneys remaining unexpended, to her nephew; the Court of Common Pleas held, that the creditors ought to pay the Legacy duty upon their several debts; and that the matter having been overlooked in an order made by the Court of Chancery for the payment of the debts, the executors, who had paid the debts in full, and then paid the Legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.

Again, in *Sanders* v. *Kiddell* (*l*), a testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the funds, would produce the *clear* yearly sum of 500*l.*, upon trust to pay the annual produce to certain of her relations in succession for life, and afterwards, as to one-fifth part, upon trust to pay it to M. C. Gascoigne for his life, and after his decease, to any wife who might survive him, during her life, and after the decease of the survivor of them, upon trust for his children: And Sir L. Shadwell, V.-C., held that the fund was not exempted from Legacy duty; for that it appeared, from the language of the Will, that the testatrix meant that what she had directed to be done, should be done at once; that M. C. Gascoigne might or might not marry a relation of the testatrix, and his children might be related in some degree to the testatrix, or they might not; and, therefore, that the word "clear" must be taken to refer not to the Legacy duty, but to the expenses of investment, and so on (*m*).

(*i*) See also accord. *Marris* v. *Burton*, 11 Sim. 161; *Ford* v. *Ruxton*, 1 Coll. 403; *Bailey* v. *Boult*, 14 Beav. 595; *Haynes* v. *Haynes*, 3 De G. M. & G. 590; 19 Beav. 499; *Warbrick* v. *Varley*, 30 Beav. 241; *Re Coles's Will*, L. R. 8 Eq. 271.

(*k*) 2 Bingh. N. S. 269.

(*l*) 7 Sim. 536.

(*m*) In this case the testator did not use the words "clear of all deductions," and besides, the parties were to take in succession: *per*

And this case was recognised and acted upon by Romilly, M. R., in *Pridie* v. *Field* (*n*).

Where one legacy is given by Will free of duty, and by a codicil another is given in *substitution* of that given by the Will, and upon the same trusts, the substituted legacy is also to be considered as given free from the duty; because, being a mere substitution, it is *primâ facie* attended with the same incidents: so where a subsequent addition is made to a prior legacy, the addition will have the same qualities (*o*).

Thus in *Cooper* v. *Day* (*p*), the testator gave to his widow 800*l.*, payable within three months from his death, and free from Legacy duty: He also gave 4,000*l.* to trustees, payable to them within the same period, free from Legacy duty, in trust for his two daughters, to be paid at twenty-one, with intermediate interest for their maintenance: By a codicil, the testator bequeathed to his wife an additional sum of 200*l.* free from Legacy duty: he also revoked the legacy of 4,000*l.* and in substitution gave in trust for his daughters 5,000*l.*, "upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisoes and limitations, as expressed in his Will concerning the legacy of 4,000*l.*": By a second codicil the testator revoked the gift of 5,000*l.*, and gave in its place 6,000*l.* to the same trustees, upon the trusts, &c., following the words in the first codicil: The only question was, whether the legacy of 6,000*l.* was to be paid free of the Legacy duty: and Sir William Grant declared, upon the authority of the cases of *Leacroft* v. *Maynard* (*q*), and *Crowder* v. *Clowes* (*r*),

Shadwell, V.-C., in *Marris* v. *Burton*, 11 Sim. 161, 163. Where a legacy, the fund being in Court, was assigned by a deed, which represented that it was *unincumbered*, it was held that the Legacy duty did not constitute an "incumbrance:" *Bliss* v. *Putnam*, 7 Beav. 40. In all cases of assignment of reversionary interests the Legacy duty which becomes payable on their falling into possession falls, in the absence of express contract, on the assignee; and where the owner of a reversionary interest settles a part of it, there is no rule which throws the burden of the Legacy duty upon the part retained, and a covenant for further assurance does not bind the settlor to indemnify the settled fund against Legacy duty: *Re Repington*, [1904] 1 Ch. 811.

(*n*) 19 Beav. 497.

(*o*) By Sir J. Leach, V.-C., 6 Madd. 31. See the cases collected, *ante*, p. 1041, note (*u*); *post*, p. 1860, note (*t*).

(*p*) 3 Meriv. 154.

(*q*) 3 Bro. C. C. 233; *S. C.*, 1 Ves. 279.

(*r*) 2 Ves. 449, 450.

that the substituted legacy of 6,000*l.* was to be taken as exempted from the Legacy duty, in like manner with the original legacy, in the place of which it was given. So in *Shaftesbury* v. *Marlborough* (*s*), a testator by his Will gave an annuity to his grandson, and directed the executors to pay the Legacy duty on all the legacies and annuities given by his Will: By a codicil, he gave an annuity to his grandson *in lieu of* the annuity given by his Will: And Sir L. Shadwell, V.-C., held, that the annuity given by the codicil was free from Legacy duty; his Honour observing, that when the thing bequeathed by a codicil is given as a mere substitution for that which is bequeathed by the Will, it is to be taken with all its accidents (*t*).

But in *Chatteris* v. *Young* (*u*), the testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.*, she was to receive the interest to her separate use during her life, and after her death, the principal was to be paid to such person or persons, as she might by her Will appoint; and, after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of Legacy duty: The daughter having died in his lifetime, he afterwards by a codicil, "instead of the legacies given to her by my Will, which are now lapsed," bequeathed to her husband 20,000*l.*: Sir John Leach, V.-C., decreed (*x*), that the husband was not entitled to have the 20,000*l.* paid to him free of Legacy duty: And upon appeal to the Lord Chancellor, his Lordship (Lord Lyndhurst) was of opinion that the legacy given to the husband by the codicil could not be considered as given by way of substitution for the legacy which the Will had destined for his wife, but was an independent, distinct, substantive bequest: He therefore confirmed the judgment of the Vice-Chancellor, and dismissed the appeal (*y*).

In *Byne* v. *Currey* (*z*), a testator by his Will, bequeathed certain legacies to charitable institutions, and directed that they

(*s*) 7 Sim. 237.

(*t*) See also *Fisher* v. *Brierley*, 30 Beav. 267; *Johnstone* v. *Lord Harrowby*, 1 De G. F. & J. 428, overruling *S. C.*, Johns. 425.

(*u*) 2 Russ. Chanc. Cas. 183.

(*x*) 6 Madd. 30.

(*y*) See also *Burrows* v. *Cottrell*, 3 Sim. 375; *Early* v. *Benbow*, *ante*, p. 6, note (*r*).

(*z*) 2 Cr. & Mees. 603; *S. C.*, 4 Tyrwh. 479.

should be paid as follows, "Which charitable legacies I direct may be paid out of my personal estate, prior to the payment of my debts, and the said legacies hereby by me given and bequeathed:" He then directed "all his legacies to be paid within two years after his decease, free of any deduction for tax or duty:" By a codicil, he bequeathed legacies payable and raiseable immediately: And the Court of Exchequer held, that the charitable legacies, and the legacies given by the codicil raiseable immediately, were payable free from Legacy duty (*a*).

In *Douglas* v. *Congreve* (*b*), a testator gave to M. S. 50,000*l.*, three per cent. consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate: And Lord Langdale, M. R., held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the Will from the payment of Legacy duty.

In *White* v. *Lake* (*c*), a testator gave several pecuniary and specific legacies, and directed that "all legacies and bequests" by his Will given, should be paid or satisfied free of duty, and he devised his residuary real estate to A. for life, and afterwards upon trust for sale: and Lord Romilly, M. R., held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the Will, that the Legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.

In *Lord Londesborough* v. *Somerville* (*d*), the testator directed Legacy duty to be paid out of his general personal estate on the annuities and pecuniary legacies given by the Will: And it was held by Romilly, M. R., that the income of residuary uninvested personal estate directed to be invested in land and settled to uses, was not an annuity within such direction (*e*).

(*a*) See accord. *Williams* v. *Hughes*, 24 Beav. 474.

(*b*) 1 Keen, 410.

(*c*) L. R. 6 Eq. 188.

(*d*) 19 Beav. 295.

(*e*) In *Calvert* v. *Sebbon*, 2 Keen, 672, a testator bequeathed some specific chattels and a sum of 200*l.* to A., and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the Legacy duty, and all other deductions, which annual sum was to be paid to A. for her life, and after her decease the principal was to be paid to other parties; and the testator directed his executors to pay the Legacy duty on

Exemption of legatee for life extended to legatee in remainder.

Out of what fund the duty is to be paid.

In *Noel* v. *Lord Henley* (*f*), a legacy was bequeathed to be paid out of the rents and profits, and the produce of the sale of a real estate devised to be sold for the payment of such legacy, *inter alia:* In a subsequent part of the Will, this legacy was directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty: And the Court of Exchequer held, that the duty on that particular legacy must be paid out of the real fund, and not out of the personalty; the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund (*g*).

Limitation of time in recovering Legacy and Succession duties.

It may here be convenient to notice that by recent statutes certain limitations of time have been imposed on the right of the Crown to recover Legacy and Succession duties. Thus by 52 & 53 Vict. c. 7, s. 14, it is provided that no person shall, under a testamentary document admitted to probate, or under letters of administration, or under a confirmation, be liable for payment of any Legacy, Succession, or Estate duty, after six years from the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true account. And further that trustees, executors and administrators, are not to be liable after six years if it be proved to the commissioners that the account rendered was correct to the best of their knowledge.

Power to deposit copies of documents and liability to duty to cease after specified period.

By sect. 13 of 52 & 53 Vict. c. 7, it is provided that:—

(1.) A person may deposit with the commissioners an attested copy of any document creating a liability for Succession or Estate duty, other than a testamentary one admitted to probate.

the specific and pecuniary legacies and yearly sum given to A.: A. and the legatees in remainder, were strangers in blood to the testator; so that the same rate of duty was chargeable on the whole bequest, and the full amount of the duty payable at once (see *ante*, p. 1773, 1774): And Lord Langdale, M. R., held, that the Legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to A., and to those in remainder; inasmuch as the residuary legatee could not on A.'s death, call back any part of the duty that had been paid.

(*f*) 7 Price, 241; *S. C.*, in Dom. Proc. 12 Price, 213.

(*g*) See also *Stow* v. *Davenport*, *ante*, p. 1856; *Wilkinson* v. *Barber*, L. R. 14 Eq. 96; *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19; *Wilson* v. *O'Leary*, L. R. 17 Eq. 419. As to the fund out of which Estate duty is payable apart from any direction in the Will, see *ante*, p. 1735 *et seq.*

(2.) A receipt is to be given by the officer of the commissioners for such document.

(3.) After such a receipt has been given for a copy of such a document, no person is to be liable for duty under it after six years from the date of notice to the commissioners of the fact which gives rise to an immediate claim to such duty.

(4.) The costs of depositing the copy and obtaining the receipt are to be considered duly incurred by the trustee or executor.

By 52 & 53 Vict. c. 7, s. 12, it is provided that (1) notwithstanding sect. 42, and any other provision of the Act of 1853, real property estates and interests shall not be liable as against purchasers or mortgagees for Succession or Estate duty after six years from the date of notice to the commissioners that the successor has become entitled, or from that of the first payment of an instalment or part of the duty or (where the successor has availed himself of the option given by 51 & 52 Vict. c. 8, s. 22), after two years from the time for payment of the last instalment or part of the duty, or in the absence of any such notice or payment after the lapse of twelve years from the happening of the event (whether before or after the passing of this Act) which gave rise to an immediate claim to such duty, or if such period expires within six years from the date of the passing of the Act, then after the expiration of six years from the last-mentioned date.

(2.) The duty unpaid at the end of such periods shall be paid by the successor or persons mentioned in sect. 44 of the Act of 1853, other than the purchaser or mortgagee, and be charged upon other property comprised in the succession (unless vested in the purchaser or mortgagee), and in the case of a mortgage upon the equity of redemption.

(3.) A purchaser or mortgagee shall not for the purpose of obtaining the exemption be bound to see that the duty is discharged out of the purchase-money or loan.

APPENDIX.

THE WILLS ACT, 1837
(1 Vict. c. 26).

An Act for the Amendment of the Laws with respect to Wills. [3rd July, 1837.]

Be it enacted, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say), the word "Will" shall extend to a testament, and to a codicil, and to an appointment by Will or by writing in the nature of a Will in exercise of a power, and also to a disposition by Will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and liveries and tenures*, in capite *and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and liveries and tenures* in capite *and by knights service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever

Meaning of certain words in this Act;

"Will:"

12 Car. II. c. 24.

14 & 15 Car. II. (I).

"Real estate:"

"Personal estate:"

1 Vict. c. 26.

Number:

Gender:

which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Repeal of the Statutes of Wills, 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5.

10 Car. I. Sess. 2, c. 2 (I).

Sects. 5, 6, 12, 19, 20, 21 & 22 of the Statute of Frauds, 29 Car. II. c. 3; 7 Will. III. c. 12 (I).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10 (I).

Sect. 9 of 14 Geo. II. c. 20.

25 Geo. II. c. 6 (except as to colonies).

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two parts of his Land;* and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The Bill concerning the explanation of Wills;* and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;* and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estates being assets, or to nuncupative Wills, or to the repeal, altering, or changing of any Will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein: and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice* as relates to witnesses to nuncupative Wills: and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled, *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries,"* as relates to estates *pur autre vie:* and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America*, except so far as relates to his Majesty's colonies and plantations in America; and

also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;* and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any Wills or estates *pur autre vie*, to which this Act does not extend.

1 Vict. c. 26.
25 Geo. II. c. 11 (I).
55 Geo. III. c. 192.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate (*a*) which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator: and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his Will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a Will or otherwise, could not at law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a Will or a surrender to the use of a Will should continue in force for a limited time only, or any other special custom, could not have been disposed of by Will according to the power contained in this Act, if this Act had not been made: and also to estates *pur autre vie* (*b*), whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate (*c*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or Will; and also to all

All property may be disposed of by Will;

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*:

contingent interest

(*a*) See *ante*, pp. 3, 150. (*b*) See *ante*, pp. 517, 1294.
(*c*) See *ante*, pp. 670, 672, note (*g*).

1 Vict. c. 26.

rights of entry and property acquired after execution of the Will.

rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a Will, and the testator shall not have surrendered the same to the use of his Will, no person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon payment of all such Stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the Will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the Will of such testator: Provided also, That where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto have surrendered the same to the use of his Will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such Will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such Stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such Stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the Will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his Will; all which Stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the Stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of Wills of customary freeholds to be entered on the court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by Will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the Will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor: and when any trusts are declared by the Will of

1 Vict. c. 26.

such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such Will: and when any such real estate could not have been disposed of by Will if this Act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c., when such estates are not now devisable as he would have been from the heir in case of descent.

VI. And be it further enacted, That if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*d*).

Estates *pur autre vie.*

VII. And be it further enacted, That no Will made by any person under the age of twenty-one years shall be valid (*e*).

No Will of a person under age valid;

VIII. Provided also, and be it further enacted, That no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act (*f*).

nor of a *feme covert*, except such as might now be made.

IX. And be it further enacted, That no Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (*g*); (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction (*h*), and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary (*i*).

Every Will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

(*d*) See *ante*, pp. 517, 1294.
(*e*) See *ante*, p. 12.
(*f*) See *ante*, p. 39.
(*g*) See *ante*, pp. 53, 90.
(*h*) See *ante*, pp. 54, 61.
(*i*) See *ante*, pp. 62, 239.

1 Vict. c. 26.

Appointments by Will to be executed like other Wills, and to be valid, although other required solemnities are not observed.

X. And be it further enacted, That no appointment made by Will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every Will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such power should be executed with some additional or other form of execution or solemnity (*k*).

Soldiers' and mariners' Wills excepted.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act (*l*).

Act not to affect certain provisions of 11 Geo. IV. & 1 Will. IV. c. 20, with respect to Wills of petty officers and seamen and marines.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth, and the first year of the reign of his late Majesty King William the Fourth, intituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy*, respecting the Wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect to services in her Majesty's navy (*m*).

Publication not to be requisite.

XIII. And be it further enacted, That every Will executed in manner hereinbefore required shall be valid without any other publication thereof (*n*).

Will not to be void on account of incompetency of attesting witness.

XIV. And be it further enacted, That if any person who shall attest the execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such Will shall not on that account be invalid.

Gifts to an attesting witness to be void.

XV. And be it further enacted, That if any person shall attest the execution of any Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove

(*k*) See *ante*, pp. 284, 440.
(*l*) See *ante*, p. 91 *et seq.*
(*m*) See *ante*, p. 37.
(*n*) See *ante*, p. 67.

the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will (*o*). 1 Vict. c. 26.

XVI. And be it further enacted, That in case by any Will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such Will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such Will, or to prove the validity or invalidity thereof. Creditor attesting to be admitted a witness.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a Will, be incompetent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof (*p*). Executor to be admitted a witness.

XVIII. And be it further enacted, That every Will made by a man or woman shall be revoked by his or her marriage (*q*) (except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions). Will to be revoked by marriage.

XIX. And be it further enacted, That no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*r*). No Will to be revoked by presumption.

XX. And be it further enacted, That no Will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*s*). No Will to be revoked but by another Will or codicil, or by a writing executed like a Will, or by destruction.

XXI. And be it further enacted, That no obliteration, interlineation, or other alteration made in any Will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses No alteration in a Will shall have any effect unless executed as a Will.

(*o*) See *ante*, pp. 800, 1500, note (*n*).

(*p*) See *ante*, p. 251.

(*q*) See *ante*, p. 138.

(*r*) See *ante*, pp. 134, 138.

(*s*) See *ante*, pp. 98 *et seq.*, 132, 1070.

1 Vict. c. 26.

be made in the margin, or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will (*t*).

No Will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXII. And be it further enacted, That no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (*u*).

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death (*x*).

A Will shall be construed to speak from the death of the testator.

XXIV. And be it further enacted, That every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will (*y*).

A residuary devise shall include estates comprised in lapsed and void devises.

XXV. And be it further enacted, That unless a contrary intention shall appear by the Will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such Will (*z*).

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his Will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold

(*t*) See *ante*, p. 106 *et seq.*

(*u*) See *ante*, pp. 42, 131, 140 *et seq.*

(*x*) See *ante*, pp. 1069, 1070.

(*y*) See *ante*, pp. 39, 49, 148 *et seq.*, 1069, 1175, 1177, 1319.

(*z*) See *ante*, p. 1197.

estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the Will.

1 Vict. c. 26.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his Will, or otherwise described, in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will (*a*).

A devise without any words of limitation shall be construed to pass the fee.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention shall appear by the Will (*b*).

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death (*c*).

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the Will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

(*a*) See *ante*, pp. 39, 151, note (*f*), 284, 1200, note (*t*).

(*b*) As to when by deed an equitable estate in fee simple will pass without words of limitation, see *Re Irwin*, [1904] 2 Ch. 752, 764.

(*c*) See *ante*, p. 866, note (*n*).

1 Vict. c. 26.

No devise to trustees or executors, except for a term or presentation to a church, shall pass a chattel interest.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (*d*).

Trustees under an unlimited devise where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by Will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*e*).

Devises of estates tail shall not lapse.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

XXXIII. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will (*f*).

Act not to extend to Wills made before 1838 (*g*), nor to estates *pur autre vie* of

XXXIV. And be it further enacted, That this Act shall not extend to any Will made before the first day of January, one thousand eight hundred and thirty-eight, and that every Will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at

(*d*) See *ante*, p. 520.
(*e*) See *ante*, p. 521.
(*f*) See *ante*, pp. 969, 1183, 1702.
(*g*) See *ante*, pp. 54, 98, 154.

which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

1 Vict. c. 26.

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XXXV. And be it further enacted, That this Act shall not extend to Scotland.

Act not to extend to Scotland.

XXXVI. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament.

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only revoking a Will or codicil, whether it should be admitted to probate, 97, n. (*n*). See *Will, revocation*.

YEAR,
generally allowed to executors for payment of legacies, 1114 *et seq.*

YORK,
distribution under custom of, abolished since December 31st, 1856., 1272.

YOUNGER CHILD,
when considered an eldest, 849 *et seq.*
when an eldest considered, 852, 853.

THE END.

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